(25,039)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 315.

CAROLINE BOLDT, ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS OF EDWARD J. BOLDT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1916.

1

SUMMONS.

United States District Court

FOR THE WESTERN DISTRICT OF NEW YORK.

2

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,

Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

3

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney at his office No. 16 Erie County Bank Bldg. in the City of Buffalo, Erie County, New York, within twenty days after the service of this summons, exclusive of the day

of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

WITNESS, The Honorable JOHN R. HAZEL, Judge of the District Court of the United States of America, at the City of Buffalo, in the Western District of New York, and the seal of said Court, this 1st day of October, in the year of our Lord, one thousand nine hundred and twelve.

S. W. PETRIE,
Clerk.

HENRY W. BRUSH,
Plaintiff's Attorney,
Office and Post Office Address
16 Erie County Bank Bldg.,
Buffalo, New York.

COMPLAINT. 7

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,

Plaintiff,

against 8

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

The plaintiff conplains of the defendant, and for her cause of action states and alleges, upon information and belief:

First: That your plaintiff is a citizen of the United States, and a resident of the City of Buffalo, County of Erie and State of New York, of which said City, County and State, Edward J. 9 Boldt, your plaintiff's intestate, had been for many years a citizen and resident at the time of his death as hereinafter alleged, and that upon the 26th day of September, 1912, your plaintiff was duly appointed by the Surrogate's Court of said County of Erie, State of New York, Administratrix of the Estate of said Edward J. Boldt, deceased, and that she has duly qualified and is now acting as such Administratrix.

10 Second: That at all the times hereinafter mentioned this defendant was and is a foreign corporation duly organized and doing business under the laws of the State of Pennsylvania, and had and has managing officials and maintains a managing office in said Western District of New York, to wit: in the City of Buffalo, N. Y., and operated and now operates lines of railroad running from the City of Buffalo, New York, south, to various points in the State of Pennsylvania and beyond, and in particular operated and does operate a certain line of railroad running from the City of Buffalo, New York, to and through
11 the cities of Olean, New York, Emporium, Renovo, Williamsport and Harrisburg, in the State of Pennsylvania, which particular cities, among others, were served by the train known as No. 94 hereinafter mentioned. That said railroad consisted and consists of the necessary switches, railroad tracks, side tracks, yards, cars, locomotives, ways, works, machinery and appliances, and employed and employs in the operation of its trains, conductors, engineers, trainmen, brakemen, yard conductors, train dispatchers, superintendents, station masters, yard masters and assistants,
12 switch tenders, switchmen, signal men, telegraph operators, and others, and is and at all times hereinafter mentioned was engaged in carrying for hire passengers and freight between the City of Buffalo, in the State of New York, and Emporium, Renovo, Williamsport and Harrisburg, in the State of Pennsylvania, and other cities and places, and is and was engaged in commerce between the different States, and that the particular acts of negligence hereinafter charged were com-

mitted, permitted or suffered to be committed 13
while said defendant was so engaging in the act
of commerce, and as a part of the act of such
commerce, between the different states, as afore-
said.

Third: That at all of the times hereinafter mentioned, this defendant, for the purpose of assisting in the making up of its freight trains, maintained and now maintains at its yards in the City of Buffalo, in the neighborhood of Babcock Street in said City, and running easterly or southeasterly therefrom, what is known as a "gravity yard," the same being an artificial hill with two 14
sides of about equal length and the apex in the middle thereof. That the length over all of said gravity yard from grade to grade was about one thousand feet, and the height of said apex was about fifteen feet above the surrounding levels. That the plan of operation of said gravity yard called for the pushing of the cars up the grade at the westerly end thereof by a locomotive until the same reached the top thereof, whereupon they were cut off by a switchman who switched them onto whichever one of the several tracks centered upon the top of said hill contained the train for 15
which they were destined, down which track they proceeded by gravity to couple upon the rest of the train at the base of the hill.

Fourth: That upon the 11th day of October, 1911, your plaintiff's intestate was, and for some years then past had been in the employ of this defendant as a yard conductor, and that his duties

16 consisted, among other things, in assisting, under the direction of the yard master and his assistant, in the making up of freight trains in and about the gravity yard aforesaid. That on said day at about 8 P. M. he had been engaged upon a certain track of said gravity yard known as Track No. 4, opposite Milton Street in said City, under the direction of the assistant yard master of said defendant, in assisting in making up a certain fast freight train known as Train No. 94, which consisted mainly of cars billed to Emporium, Renovo, Williamsport and Harrisburg, and other places,
17 in the State of Pennsylvania, and made up by the pushing of said cars up the westerly or northwesterly side of the hill by a locomotive and allowing the same to come down by gravity on the other side and couple onto the locomotive and following cars of their train in the manner hereinbefore described. That said train, consisting of thirty to forty cars, had been fully completed, was lying at the base of the hill, the rear half of the train with the caboose attached thereto being upon Track No. 2, near to Track No. 4 aforesaid, the front of said train with the locomotive attached thereto lying on said Track No. 4, and various of
18 defendant's employees, preparatory to taking said train out upon its run, being engaged in looking over its couplings, air brakes and other equipment to be assured that the same were in proper condition therefor. That the last six cars of said train lying upon Track No. 4 were detached from said train about 160 feet, having most recently been switched thereon. That said assistant yard master and your plaintiff's intestate were stand-

ing on the ground at the rear of said train at the 19
right thereof; said assistant yard master signalled to said engineer to back up and couple on to said last six cars, which being done, it was discovered that said coupling did not ("make"). That upon the said coupling failing the second time, said assistant yard master signalled said engineer to draw off said train a space of about 20 to 30 feet, which being done, said assistant yard master thereupon went into the space between said detached cars and the train for the purpose of examining the draw-head upon the first detached car and pulling out the coupler thereof. That 20
said draw-head being a very heavy one, said assistant yard master was unable to handle the same, or to pull out the said coupling alone, and your plaintiff's intestate in the performance of his duty followed him and assisted him. That while they were in that position no other person was sufficiently near to apprise them of possible danger, nor was any person or employe posted to look out therefor. That while your plaintiff's intestate and such assistant yard master were so occupied with the draw-head of said car, the said engine which had theretofore been pushing cars over the hill in the making up of said train and 21
which was then at the westerly or northwesterly end of said gravity yard, came over the hill pushing several cars ahead of it, and the employes of said defendant although well knowing that said train No. 94 was already made up, and that certain other employes were of necessity engaged in examining and testing its couplings, air brakes and other equipment, preparatory to starting, and that

22 therefore the switching of further cars upon said track No. 4 was dangerous, nevertheless negligently caused said cars to be switched to said track No. 4 where your plaintiff's intestate then was. That so carelessly and negligently were said cars handled by the employes of defendant as they were run in upon said track No. 4 and so slightly was the speed of same reduced by said employes that they were caused to crash violently into said detached cars of the train upon which your plaintiff's intestate was working, causing them to move forward so rapidly that they closed up the gap
23 of 20 to 30 feet between said detached cars and the rest of the train, running over your plaintiff's intestate and instantly killing him. That your plaintiff's intestate had no knowledge of the proximity of said cars, nor were any lights used thereon or any alarm or warning given.

And your plaintiff further says that although the necessity therefor has at all times been clearly apparent said defendant has at all times neglected to promulgate a rule to the effect that whenever employes have occasion in the performance of their duties, as aforesaid, to go between sections
24 of detached or standing trains for any purpose however temporary, in any yard or at any station where switching or the making up of trains is going on, a lookout should be posted to warn against impending danger of cars being switched against them when such employes are unable to see such cars.

And your plaintiff further alleges that said defendant was negligent in inviting or commanding

your plaintiff's intestate to go between said cars 25
into a position of danger; that said defendant was negligent in inviting or commanding your plaintiff's intestate to go between said cars without posting a lookout to warn against impending danger as aforesaid; that said defendant was negligent in failing to promulgate and enforce a rule to the effect that when employes have occasion to go between cars in the manner hereinbefore set forth, a lookout should be posted to warn against the danger of other cars being switched against the cars or train they are working upon; that said defendant was negligent in causing said cars to be 26
switched from said gravity yard upon said track No. 4 knowing that said train No. 94 was already made up and that certain employes of said defendant were getting said train ready to take out upon its run, and must of necessity be engaged in looking said train over, in order to see that its couplings, air brakes and other equipment were in proper condition therefor, and that, therefore, further switching of cars upon said track No. 4 was dangerous; that said defendant was negligent in operating the said cars switched as aforesaid upon said track No. 4 without lights or warning and at an unnecessary rate of speed causing them to crash 27
with such violence upon the succeeding cars as to cause them to run over your plaintiff's intestate, such speed being in excess of that required to make a coupling with said cars.

Fifth: That said accident was caused wholly by the fault and negligence of said defendant as

28 hereinbefore alleged, and without any default on the part of your plaintiff's intestate.

Sixth: That your plaintiff's intestate was the son of your plaintiff, and was a strong able-bodied man of the age of 33 years, unmarried, earning about the sum of $125.00 per month and the sole support of your plaintiff.

WHEREFORE, your plaintiff demands judgment for the sum of thirty thousand dollars ($30,000.00) and the costs of this action.

29

HENRY W. BRUSH,
16 Erie County Bank Bldg.,
Buffalo, N. Y.

C. W. DILLE,
Cleveland, Ohio,
Plaintiff's Attorneys.

UNITED STATES OF AMERICA,

STATE OF NEW YORK,
COUNTY OF ERIE,
30 CITY OF BUFFALO, } ss.:

Caroline Boldt, being duly sworn, says that she is the plaintiff in the above entitled action; that she has heard read the foregoing conplaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon inform-

ation and belief, and as to those matters she be- 31
lieves it to be true.

CAROLINE BOLDT.

Subscribed and sworn to before me
this 28th day of September, 1912.

J. W. WHITE,
Comm'r of Deeds,
Buffalo, N. Y.

ANSWER.

32

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,

Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

33

The defendant above named answering the complaint herein by Frank Rumsey, its attorney, admits that it is a foreign corporation organized and doing business under the laws of the State of Pennsyl-

34 vania and maintains an office for the transaction of business in the City of Buffalo, N. Y., and operates lines of railroad running from the City of Buffalo, N. Y., south to various points in the State of Pennsylvania and beyond, one of which lines extends from the City of Buffalo to and through the Cities of Olean, New York, Emporium, Renovo, Williamsport and Harrisburg in the State of Pennsylvania, and that it maintains yards and switch tracks for the conduct of its business as a common carrier for hire in the various places above mentioned.

35 The defendant further admits that the plaintiff's intestate had for some years prior to October 11th, 1911, been in the employ of the defendant as a yard conductor, and that on the 11th day of October, 1911, while the said plaintiff's intestate was employed by the defendant he came to his death by being run over by a freight car or cars in the freight yards of the defendant in the City of Buffalo, N. Y.

The defendant further answering said complaint, denies knowledge or information sufficient
36 to form a belief as to each and every allegation in said complaint contained, except the allegations thereof hereinbefore specifically admitted.

SECOND.

This defendant further answering said complaint, and as a separate and distinct defense thereto, alleges, upon information and belief, that the said Edward J. Boldt, plaintiff's intestate,

at the time of his death, had been in the employ 37
of the defendant as a yard conductor for a considerable period of time, and he well understood the nature of the work, which he was required to perform, and well understood such dangers as were involved in such employment and that by entering and continuing in the service of the defendant in said capacity he assumed all risks incident to said employment and involved therein, including risks of an accident such as that set forth in the complaint.

THIRD.

The defendant further answering said com- 38
plaint, and as a separate and distinct defense thereto, alleges, upon information and belief, that the accident which caused the death of the said Edward J. Boldt was caused through the negligence and carelessness of the said Edward J. Boldt and not by reason of negligence on the part of the defendant, its agents or employees.

FOURTH.

The defendant further answering said complaint and as a separate and distinct defense 39
thereto, alleges that for many years and during all the times therein mentioned it did have and still has a branch or department of its railroad service known as the Relief Department, for the establishment and management of a fund known as the Relief Fund for the payment of definite sums to employees of the defendant who became members thereof, and who under the regulations thereof shall be entitled thereto when disabled by

40 accident or sickness, and in the event of their death, to relatives or other beneficiaries specified in the application for membership; that said Relief Department of the defendant, through the officers of the latter having the control and management of said department, have adopted and promulgated rules and regulations which embody the obligations of the defendant to its employees who become members thereof, and to their legal representatives, and the obligations of such members and their legal representatives to the defendant, which control and regulate the legal relation of each to the other.

41

The defendant further alleges that the plaintiff's intestate while in the defendant's employ and prior to the accident in question, made application to the defendant for membership in the said Relief Department, which application was in writing and signed by the said plaintiff's intestate; that in and by said application the said plaintiff's intestate did consent and agree to be bound by the regulations of the said Relief Department as contained in the book of regulations of the said Department thereafter adopted, and by the pro-

42 visions of any agreement or agreements made by the defendant with any other corporation or corporations establishing any administration of their respective Relief Departments in accordance with said book of regulations. That in any by the terms of said application the plaintiff's intestate further agreed with the defendant that the acceptance of benefits from the said Relief Fund for an injury or death shall operate as a release of

all claims for damages against the defendant aris- 43
ing from such injury or death which could be made by or through the plaintiff's intestate or by or through his legal representatives, and further agreeing that he or his said legal representatives would execute such further instrument as may be necessary formally to evidence such acquittance.

The defendant further alleges that the said application of the plaintiff's intestate for membership in the said Relief Department was duly approved, and that the said plaintiff's intestate thereupon became and up to the time of his death was, a member of the said Relief Department of the 44
defendant, and that he, his beneficiaries and legal representatives are bound by the agreements contained in said application and by the regulations controlling the operation of said Department.

Defendant further alleges that Caroline Boldt, the mother of the deceased, as the beneficiary named in the said application of the plaintiff's intestate for membership in the said Relief Department; has applied for, accepted and received from the said Relief Fund for and on account of the death of the plaintiff's intestate, as alleged in 45
the complaint, and on account of which the plaintiff seeks to recover of the defendant in this action, the amount of two hundred and fifty dollars ($250.00); that the said Caroline Boldt on or about the 30th day of October, 1911, for and in consideration of the payment of the above amount duly executed an instrument in writing, duly signed and sealed by her, whereby she acknowl-

edged full satisfaction and discharge of all claims or demands on account of or arising from the death of the said plaintiff's intestate, and releasing the defendant of and from all liability on account of the transactions, acts and matters set forth in the complaint herein, which said release was executed before the commencement of this action.

The defendant further alleges that, pursuant to the agreements contained in the application of the plaintiff's intestate for membership in said Relief Department, the acceptance of the said amount by the said Caroline Boldt operates as a release of all claims for damages against the defendant arising from the injury alleged in the complaint which could be made through the plaintiff's intestate, his beneficiaries or legal representatives.

WHEREFORE, the defendant demands judgment that the complaint herein be dismissed with costs.

FRANK RUMSEY,
Attorney for Defendant,
Office and P. O. Address,
608 Brisbane Building,
Buffalo, N. Y.

STATE OF NEW YORK,
COUNTY OF ERIE,
CITY OF BUFFALO. } ss.:

FRANK RUMSEY, being duly sworn, deposes and says that he is the attorney for the defendant above named; that he has read the foregoing

answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the defendant is a foreign corporation, which is the reason why this verification is made by deponent. 49

Deponent further states that the ground of his belief as to all matters not stated in said answer upon his own knowledge, are reports made to deponent, and other documents and correspondence relating to the matter or matters in question or controversy, and to the subject of the allegations contained in said answer. 50

FRANK RUMSEY.

Subscribed and sworn to
before me this 24th day
of October, 1912.

SARA J. BRADY,
Commissioner of Deeds,
Buffalo, N. Y.

51

52 CLERK'S MINUTES OF TRIAL.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,

Plaintiff,

against

53 PENNSYLVANIA RAILROAD COMPANY,

Defendant.

Trial before the Court and a jury.

December 13, 1912.

Appearances:

HENRY W. BRUSH and C. W. DILLE, for Plaintiff.

FRANK RUMSEY and MR. ADAMS, for Defendant.

54 The Court orders the jury to be empanelled.

Jury drawn and sworn as follows:

Wm. W. Jones,	Daniel B. Driscoll,
Morris L. Hall,	Jesse G. Bartoo,
Frank W. Spooner,	Lucius I. Clark,
John Deckop,	Charles H. Smith,
Jay M. Trevett,	Wm. Cowdry,
Bert W. Fancher,	Wm. C. Crandall.

Mr. Brush opens for the plaintiff. 55

Recess until 2 P. M.

Mr. Adams opens for the defendant.

WITNESSES FOR THE PLAINTIFF:

Caroline Boldt,
James Joseph Murphy.

Court adjourned to 10 o'clock A. M., December 16, 1912.

December 16, Trial Continued. 56

Same appearances.

WITNESS FOR THE PLAINTIFF:

James J. Murphy, recalled.

Motion by the plaintiff to amend complaint.

Denied.

PLAINTIFF RESTS.

Defendant moves to dismiss complaint.

Recess to 2 o'clock P. M. 57

WITNESSES FOR THE DEFENDANT:

Robert Hallmore,
Charles King,
Frank M. Ashmead,
Elmer P. Gerhardt,
John Gleason,
Frank Bull,

58 Joseph C. Chappell,
Calvin E. Teeling,
William C. Lindner,
Charles J. Hohl,
Charles B. Colgrove.

DEFENDANT RESTS.

PLAINTIFF RESTS.

Court adjourned to 10 o'clock A. M. to-morrow.

December 17, Trial Continued.

59 Same appearances.

Mr. Adams sums up for the defendant.

Mr. Dille sums up for the plaintiff.

The Court charges the jury and it retires for deliberation in charge of sworn officers.

Court adjourned to 10 o'clock A. M. to-morrow.

December 18, Trial Concluded—Verdict.

The Jury comes into court and presents a sealed verdict in writing signed by each juror,
60 which is in words, to wit:

"They find a verdict for the defendant of no cause of action."

Plaintiff moves for a new trial. Denied.

S. W. PETRIE,
Clerk.

JUDGMENT AND NOTICE OF ENTRY. 61

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,

Plaintiff,

against

62

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

This action having been duly brought on for trial at a trial term of this Court held in and for the Western District of New York on December 13th, 1912, before the Hon. John R. Hazel, Justice presiding, and a jury, and the plaintiff having appeared by Henry W. Brush, her attorney, and the defendant having appeared by Frank Rumsey, its attorney, the trial of the issues having been duly heard and the jury having, on the 63 18th day of December, 1912, rendered a verdict in favor of the defendant and against the plaintiff for no cause of action, and the defendant's costs having been taxed at the sum of sixty dollars and fifty-five cents ($60.55),

NOW ON MOTION of FRANK RUMSEY, attorney for the defendant, it is hereby

64 ADJUDGED AND DECREED that the defendant, Pennsylvania Railroad Company, have judgment against the plaintiff upon the issues in the action, and that the defendant recover of the plaintiff the sum of sixty dollars and fifty-five cents ($60.55), costs and disbursements as taxed.

Judgment signed this April 14, 1913.

S. W. PETRIE,
Clerk.

SIR:

65 TAKE NOTICE, that the within is a copy of a Judgment entered herein in the Clerk's Office of United States District Court, Western District of New York, on the 14th day of April, 1913.

Dated, April 15, 1913.

Yours, etc.,

FRANK RUMSEY,
Attorney for Defendant,
Office and P. O. Address,
608 Brisbane Building,
Buffalo, N. Y.

66

To:

HENRY W. BRUSH,
Attorney for Plaintiff.

ORDER DENYING MOTION FOR NEW TRIAL AND NOTICE OF ENTRY. 67

At a Term of the United States District Court, held in and for the Western District of New York, at the Federal Building in the City of Buffalo, New York, on the 18th day of December, 1912.

Present:
HON. JOHN R. HAZEL,
United States Judge, Presiding.

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CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, Deceased,
Plaintiff,
against
PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The issues in this action having been brought 69
on for trial at a Trial Term of this Court on the 13th day of December, 1912, and the issues having been tried and the jury having rendered a verdict in favor of the defendant for no cause of action, and the plaintiff having moved to set the verdict aside and for a new trial upon the minutes of the Court, and after hearing Henry W. Brush,

of counsel for the plaintiff, in support of said motion and H. J. Adams opposed thereto, it is hereby

ORDERED, that the plaintiff's motion to set aside the verdict and for a new trial be and the same hereby is denied.

JOHN R. HAZEL,
United States Judge.

SIR:

TAKE NOTICE, that the within is a copy of an Order denying motion for new trial, entered herein in the Clerk's Office of United States District Court, Western District of New York, on the 14th day of April, 1913.

Dated, April 15, 1913.

Yours, etc.,

FRANK RUMSEY,
Attorney for Defendant,
Office and P. O. Address,
608 Brisbane Building,
Buffalo, N. Y.

To:

HENRY W. BRUSH,
Attorney for Plaintiff.

OPINION OF TRIAL COURT ON MOTION FOR NEW TRIAL. 73

DISTRICT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix, etc.,

against

PENNSYLVANIA RAILROAD COMPANY.

HENRY W. BRUSH, Buffalo, N. Y., and C. W. DILLE for plaintiff. 74

FRANK RUMSEY, Buffalo, N. Y., for defendant.

HAZEL, J.

Motion for new trial based upon exception to the refusal of the court to instruct the jury in the following words:

> "Upon the subject of the assumption of risk I request your Honor to charge the jury that the risk the employee now assumes since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees." 75

76 The action was brought under the Federal Employers' Liability Act of April 22, 1908, which in terms provides that a railway carrier shall be liable to employees injured in the course of employment for the negligence of any of its officers, agents or employees.

In the instructions to the jury the court stated the common law rule of the assumption of risk, and it would no doubt have been proper to have instructed the jury in the words of the request. Counsel at the time of making the request read from a reported decision, Wright vs. Yazoo & M.
77 V. R. Co., 197 Fed. 97, as a preface to his request to charge. The refusal was made under a misapprehension, and if I believed that it had operated prejudicially to the plaintiff, I should assent to a new trial, but the refusal of the request, correct in the abstract, was not in any sense prejudicial to the plaintiff's rights, nor, had the instruction been given in the words of the request, would it, in my opinion, have resulted in a different conclusion by the jury.

The jury was advised that the nature of the
78 employment required the workmen to work in a dangerous place, and that those who take upon themselves occupations of that character assume the ordinary risks of the employment. And just in advance of such statement it was pointed out that the particular acts of negligence which it was claimed caused the accident were attributable to the brakeman Bull, an employee engaged in run-

ning freight cars down a gravity track, and to the 79
defendant for its failure to promulgate proper rules for the control of the freight cars running over the hump in the gravity yards. The instructions in their entirety were directed toward negativing the assumption of risk by the deceased of the negligence of any of the defendant's officers or servants, and, therefore, failure to point out in more technical language that the deceased did not, since the passage of the Employers' Liability Act, assume the risk incident to the negligence of the officers or agents of the company could not have misled the jury or prejudiced the rights of the 80
plaintiff.

Motion for new trial denied.

March 4, 1913.

JOHN R. HAZEL,
D. J.

81

82 STIPULATION EXTENDING TIME TO FILE RECORD.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix, etc.,
Plaintiff,

vs.

83 PENNSYLVANIA RAILROAD COMPANY,
Defendant.

It is hereby stipulated that plaintiff's time in which to make, file and serve a Case and Bill of Exceptions herein be extended thirty days from the date hereof, and that prior orders made by this Court on the 3rd day of May, 1913, the 3rd day of July, 1913, the 8th day of September, 1913, the 8th day of October, 1913, and the 8th day of November, 1913, extending plaintiff's time in which to make, file and serve a Case and Bill of
84 Exceptions herein, may be omitted from the printed record herein.

Dated, Buffalo, N. Y., Jan. 6th, 1914.

FRANK RUMSEY,
Attorney for Defendant.

HENRY W. BRUSH,
Attorney for Plaintiff.

ORDER EXTENDING TIME TO FILE RECORD. 85

IN THE DISTRICT COURT OF THE UNITED STATES OF THE WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT as Administratrix, etc.,
Plaintiff,
vs.
PENNSYLVANIA RAILROAD COMPANY,
Defendant. 86

On reading and filing the stipulation of the parties herein, and on motion of Henry W. Brush, attorney for plaintiff, it is

ORDERED, That the plaintiff's time in which to make, file and serve a Case and Bill of Exceptions herein be extended thirty days from the date hereof, and that prior orders made by this Court, May 3rd, 1913 and July 3rd, September 8th, October 8th, and November 8th, 1913, 87 extending plaintiff's time in which to make, file and serve a Case and Bill of Exceptions herein, be omitted from the printed record herein.

Dated, Buffalo, N. Y., January 6th, 1914.

JOHN R. HAZEL,
District Judge.

88 STIPULATION EXTENDING TIME TO FILE RECORD.

DISTRICT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix, etc., Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant.

It is hereby stipulated that plaintiff's time in
89 which to make, file and serve a Case and Bill of Exceptions herein be extended thirty days from the date hereof.

Dated, Buffalo, N. Y., Feb. 2nd, 1914.

FRANK RUMSEY,
Attorney for Defendant.

HENRY W. BRUSH,
Attorney for Plaintiff.

ORDER EXTENDING TIME TO FILE RECORD

DISTRICT COURT OF THE UNITED STATES,
90 WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix, etc., Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant.

On reading and filing the stipulation of the parties herein, and on motion of Henry W. Brush, attorney for the plaintiff, it is

ORDERED, That plaintiff's time in which to make, file and serve a Case and Bill of Exceptions herein be extended thirty days from the date hereof.

Dated, Buffalo, N. Y., Feb. 2nd, 1914.

JOHN R. HAZEL,
District Judge.

BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK. 92

CAROLINE BOLDT, as Administratrix, etc., Plaintiff,
against
PENNSYLVANIA RAILROAD COMPANY, Defendant.

Trial had before Hon. John R. Hazel, District Judge and a jury commencing December 13th, 1912.

Appearances:

For the Plaintiff—HENRY W. BRUSH, C. W. DILLE of Counsel. 93

For the Defendant—FRANK RUMSEY, HAROLD J. ADAMS of Counsel.

CAROLINE BOLDT, sworn in her own behalf, testified as follows:

DIRECT EXAMINATION by Mr. Brush:

I am the plaintiff in this action, and am 57 years old, and reside at 433 Pratt St. Have resided there only a year. Have resided in the city

94 *Caroline Boldt, Plaintiff, Direct.*

of Buffalo, State of New York, for over thirty years. I am the mother of Edward J. Boldt, and the administratrix of his estate appointed by the Surrogate of Erie County.

Letters of Administration offered in evidence.

Received and marked "Exhibit P-1."

EXHIBIT "P-1."

95 LETTERS OF ADMINISTRATION.

THE PEOPLE OF THE STATE OF NEW YORK BY THE GRACE OF GOD FREE AND INDEPENDENT.

To all to Whom these Presents Shall Come or May Concern, Send Greeting:

Know Ye, That at a Surrogate's Court held in and for the County of Erie and State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 26th day of Sep-
96 tember, one thousand nine hundred and twelve before Hon. Louis B. Hart, Surrogate, a decree was duly made appointing Caroline Boldt administrator of the personal estate of Edward J. Boldt, late of the City of Buffalo, in said County, deceased, intestate.

And said administrator having taken the oath of office, and executed a Bond as required by said

decree, now therefore, we do grant unto you these LETTERS OF ADMINISTRATION, giving and granting unto you full power and authority to administer and dispose of the personal estate of said deceased as required by law.

But in any action hereafter brought by you as such administrator against any person, party or corporation whatever, for negligently causing the death of the said deceased, your authority is hereby limited to the prosecution of such action; and you are hereby forbidden and restrained from com- 98
promising said action or enforcing any judgment which you may recover, until the further order of the Surrogate of Erie County, New York.

IN TESTIMONY WHEREOF, We have caused the seal of our said Surrogate's Court to be hereunto affixed.

WITNESS, Hon. Louis B. Hart, Surrogate of said County, in the City of Buffalo, in said County, the 26th day of September, 1912.

(Seal) WILLIAM R. POOLEY, 99
Clerk of the Surrogate's Court.

My son was 32 years old when he died. He resided at No. 1258 Clinton St., in this city. He lived in that neighborhood since he worked for the Pennsylvania Railroad Co., about ten years. He

was in good health and sound physically, so far as I know, when he died. He was of good physique and his habits were good. I think he was earning somewhere about 35 cents an hour or 36 cents. He and I were living alone together and he was the sole support of the household. He was my personal and sole support, and contributed somewhere around $50.00 per month regularly for the support of the household, and in addition to that paid his own personal expenses. He bought things and contributed to the up-keep of the house
101 and its furnishings; I never kept particular track of what he gave me; sometimes more, sometimes less; he provided for all my personal necessities, for the furnishings of the house, and so forth.

CROSS EXAMINATION by Mr. Adams:

I live by myself now. I have other children, two sons and a daughter. They are all married. Two live here in Buffalo and one is in the navy. My youngest son is now working for the Pennsylvania Railroad Co. He is married. My son Edward was single when he was killed; he was the
102 only one unmarried. My address at the present time is 433 Pratt Street. My married son lives on Madison Street. I don't think my husband is dead, we are separated. I don't live with him.

Q. You say he contributed about fifty dollars to your support?

A. Yes, sir, after the younger son got married.

Q. Before that?

A. They then divided up.

Q. They both contributed?

A. Yes, sir.

Q. Your daughter also?

A. No, she is not doing anything for me. She lives by herself.

Q. By fifty dollars—you mean that he gave you fifty dollars for the maintenance of the household?

A. About that.

Q. And out of that you boarded him and yourself and paid the rent?

A. Yes, sir. 104

He had worked for the Pennsylvania since 1901, I think. He hired out as a conductor at the time of the Pan-American, that was about the time he started. During that time he was steady and industrious, worked every month, and furnished his share for my support. My younger son got married six months before the accident. He is not contributing to my support.

JAMES J. MURPHY, a witness sworn for the 105 plaintiff, testified as follows:

DIRECT EXAMINATION by Mr. Brush:

I reside at 215 Bristol Street, upstairs, and my occupation at the present time is yard conductor for the Pennsylvania Railroad Co. at the Babcock Street Yards. I was formerly assistant yard

106 master, and was such on October 11th, 1911, the time that Boldt was killed. I remember the occurrence. My duties at that time consisted of working in the Pennsylvania yards and in and about the gravity yard in making up trains and the classification of freight cars. On the day mentioned, October 11, 1911, on the evening of that day, I was engaged around and about the gravity yard near Babcock Street. I was engaged all around there and Boldt, plaintiff's intestate, was working with me at the time.

107 Witness shown map.

That is a correct representation of the gravity yards on Babcock Street or near Babcock Street.

Received in evidence, marked "Exhibit P-2."

This is the south portion of the gravity yard. The hump, is at the northerly end. This building here is the Yard Master's Office. It is at the highest point of the hump.

108 Q. From this point, almost opposite the yard master's office—at the point where the tracks separate—is that the place where the cars are switched off to take the tracks for which they are destined?

A. The cars are cut off right here—here is the scale—the cars are cut off here and this is the scale here—here is the gravity and you have so

much room there to get in the yard—it is double track at the top.

I mean uncouple them, when I say cut them off. There is a switch tender there and he throws the switch for whichever track you want. The conductor that cuts off the cars indicates to him where the cars shall be switched to, that is the conductor of the engine who has brought the cars up that hump. He understands where all the cars go, and he puts them in whichever tracks they are making up trains on. He knows which one of 110
those several tracks running down from the top of the hump are to contain certain trains, and he knows when they are completely made up. The track going over the hump is called the "hump lead."

Q. From the point that you have indicated—which you say is a double track—does that "hump lead" run down through the middle of the side tracks?

A. Where I indicated are double tracks—there are two tracks together—one has a scale for weighing—when they are weighing cars they use 111
the other tracks that are alongside; the various leads run from 5 to 1 and from 5 to 10—right and left of the hump—number 5 is the straight track.

Q. You say number 5 is the straight track?

A. Yes, sir, right off from the top of the hump.

112 *J. J. Murphy for Pltf., Direct.*

Q. Number 5 is the one that proceeds straight down from the hump?

A. Yes, sir.

Q. About how high is that hump above the surrounding levels of that yard?

A. I could not say the grade but I think it is about five feet—the average grade from where the accident happened to the top of the hump I think the grade figured out would not come to 5 feet—I would not swear to that—it is gravity.

113 Towards Seneca Street from the yard master's office there is another track that is on the level of the surrounding—I think about 5 feet below the level of that hump. This gravity yard was used in making up specific freight trains. On the night in question I was engaged with Mr. Boldt's assistance in making up train known as Second 94, a fast freight, running from Buffalo to Emporium by way of Olean, and from there to Harrisburg and then Philadelphia. When one train was completed the "hump conductor" would use another track to make up another train on. So that when one train was completed he would put the
114 other cars that came up on another track to make up another train. This train number 94 was made up of cars destined for points in Pennsylvania. Olean, Rochester cars—set off to Hinsdale. Olean—all large cities along the Pennsylvania line—with merchandise and stuff. It was mostly made up of cars destined for Pennsylvania points and beyond, made up on station order; that is they were all arranged in the order that the

stations came, so that they could be set off, but the bulk of this train was made up of cars for Pennsylvania points.

Q. Just previously to the time that this accident happened, what was the condition of this train number 94 so far as being completed was concerned?

A. The hind portion of the train was made up; the head portion of the train was set on number 4 while he was making up the first section.

Q. What is that? 116

A. The hind part of the train was made up on number 2 and the head portion of the train was made up on number 4 and he left them stand there while he was making up the first section of the train; after he had that train made up he came in and completed the second section.

Q. When you speak of the first and second sections, what do you refer to?

A. The first section is that which was then lying on track No. 2.

Q. It was on number one. That was all made up—the first section of number 94.

A. Yes, sir. 117

Q. That was all made up ready to start at that time?

A. Yes, sir.

Q. The rear part of the second section of train 94 was on what track?

A. Number 2.

Q. That was on track number 2?

A. Yes, sir.

Q. That is indicated on the diagram as two tracks to the left or the north of this track number 4?

(Witness shown.)

A. It was the second track from track 4—number 3 is between 4 and 2.

Q. The second track from number 4 to the north?

A. The hump is north—it would not be north
119 according to the right diagram, we were working nearly south.

I would call it east. From the rail of number 4 to the rail of number 2 would be 12 or 15 feet to leave room for track 3 to come in between. The rear part of this second section of train number 94 was lying on track number 2, with the caboose on the end, back to the north end of the track. There was 15 cars on the south end of number 4; then there was an opening and then another 4 cars that was to complete the train.

Q. Then there were 19 cars altogether on track
120 number 4 off from train number 94?

A. Yes, sir, of train 94.

Q. That comprises the section of the train closest to the locomotive?

A. Yes, sir.

Q. As you understood it all the cars of that portion of the train were made up—they had been all switched thereon?

A. Yes, sir, they had been all switched in on number 4 on section orders.

Q. So that the whole of the second section of train 94 was made up at this time that you are speaking of?

A. The whole train was made up at that time.

Q. Completed?

A. Yes, sir, all that he had to do was to back up 4 and put it on number 2.

Q. You had to take part of the train—the section of the train to which the engine was attached and pull it out and double over on to the part 122
that the caboose was attached to?

A. Yes, sir.

Q. Is that what you call doubling over?

A. Yes, sir, that is what we call doubling over.

Q. So that this train was completed at the time that I have mentioned?

A. Yes, sir.

Just immediately previous to this accident I was between tracks 4 and 3 and Boldt was between tracks 4 and 5, so that Boldt was on one side of the train and I was on the other.

123

Q. What was the condition of that part of the train that you were adjacent to?

A. I was preparing the knuckle to get it closed—

Q. I am not referring to the time when you went in between the cars; I am asking what the condition of that part of the train was—was it all coupled up?

A. No, sir, it was not coupled up.

Q. What was the situation?

A. I walked along there and there was an opening in the train.

Q. By opening, you mean what?

A. They were apart—not coupled together.

Q. How many cars were to the rear of that opening?

A. Four cars.

Q. How far towards the end of number 4 track did they extend—towards the hump end?

125 A. From the top of the hump about 500 feet.

Q. How close to the beginning of track number 4?

A. About 200 feet.

Q. Did you say five cars?

A. Four cars. The end of the fourth car was about 200 feet from the beginning of No. 4 track.

The distance between the end of this section of the train which was then lying on track 4 and the first one of these detached cars when I went in there to make the coupling was four or five car lengths of space, which would be about 250
126 feet, so that there was a space of about 250 feet between the ends of this string that the engine was attached to and these four separated cars, which were on the end of this train as then completed. When I ascertained that that space was there I gave the engineer the signal to back up and couple on to those cars, and the coupling failed to "make." They were automatic couplers. I ascertained that both knuckles closed. The drawheads were not

caught properly when I picked them up. When the cars came together the knuckles didn't meet so that they didn't "make." I saw it, I looked in there and saw it with my lamp. I held my lamp there and saw that the knuckles didn't meet. I then gave the signal to the engineer to go ahead and I opened the knuckle. When I say I signalled to go ahead I mean to pull the 15 cars away from the oth- 4 and make an opening of about 10 feet. I attempted to make that coupling more than once by backing up and making an effort to couple. It failed to make twice. The last time I tried to 128
make the coupling I noticed the knuckle didn't close—they made but when I swung the engineer up the cars came to a stop and the cars parted and I discovered that the coupling would not "make." I mean by "swinging the engineer up" that I gave him the signal to stop, and then I saw that the knuckles hadn't closed. When I swung him up—gave him the signal to stop, he stopped and the cars parted and I saw that the knuckle was still open; I didn't know how much space there was there when I gave the signal to stop—then I gave him the signal to go ahead so 129
that I could step in there and determine and see if the knuckle could be closed. He took the signal and went ahead about 20 feet, so that there was a good space to step in between the cars, a space of about twenty feet between the end of this string and the first of those detached cars. I then stepped into that space to determine if the knuckle could be closed. Just at the time I stepped in,

Boldt arrived—he wasn't there previously to that time—he was coming down the track. He hadn't followed me over there, he was just coming down the track at the time. Just as I stepped in there, he arrived. I said to him, "the knuckle—the lug of the knuckle is broken." When the knuckle was open I looked in there and saw that it was broken, so that I know the knuckle was broken.

Q. Can you describe it so that we can get some idea—describe that draw bar and knuckle?

131 A. The draw rod on the car was a brand new draw head; and when you shoved those knuckles close the pin drops down and holds the knuckle in the draw head.

So that the knuckles fit in together, so that it was closed in the drawhead of the car; the end of the knuckle which the lock holds was broken off so that the lock would not hold the knuckle in the coupler and keep it closed. That was the condition of the coupler as I saw it with my lantern. In other words it was like a latch with the tongue broken off; that is a conparison. Just

132 at that moment Boldt arrived.

The Court: Did you say the tongue was broken off?

A. The lug of the knuckle was broken off.

Mr. Brush: He said it looked like a latch with the tongue broken off.

After seeing if the knuckle could be closed I stood in front of the coupler of the car myself and Eddie Boldt was standing between tracks 4 and 5. Number 5 was the clear track to the hump, no cars at either end of it. When I was standing there, there was a cut went in on track 3—the next track to 4; I jumped out from between the cars on 4—between tracks 4 and 3, thinking the cars were coming in on that track. I said to Eddie, "Those cars went in on number 3," I said, "How does she look?" At that time he lit a cigarette; he said, "She looks all right, go ahead." When I 134
asked Beldt how she looked I meant if there was any cars coming in on track 4. That was the first conversation had taken place between us. He said, "All right, go ahead," and I stepped in myself between the cars on number 4 and this coupler that I was working on was headed south. The cars were north. The head of the car was south and Eddie was looking north where that engine was working, in the direction that the hump engine was working, when I stepped in there. And when he made that remark, "All right, go ahead," I went in and got hold of the knuckle and was just ad- 135
justing it when he turned around and he said, "Wait, I will hold the pin." That was an ordinary sized drawbar. I could not say how heavy it was.

Q. Were you able to handle it alone?

A. The draw bar was gauged—I was able to handle the coupler alone; I didn't have to move the draw bar, only had to move the knuckle.

Q. You required assistance to slip the pin in?

A. I could slip the pin in, but he said, "Wait, I will hold the pin." The pin is only about as heavy as a lead pencil—

Q. But the draw bar and the coupler that you had hold of is heavier?

A. No, sir, the draw bar didn't need to be held; it is a big draw head in the cars.

Q. But adjusting that coupler required two men to do it properly?

A. Not to adjust the knuckle; the draw bar was adjusted—the draw bar was where it had to be.

137 By the Court:

Q. What did you do to adjust it—did you hold anything?

A. I just held the knuckle.

Q. And he held the pin?

A. While I was doing that he turned around and said, "Wait, I will hold the pin."

Q. His idea being to drop the pin in place?

A. Yes, sir, when I shoved the knuckle forward.

By Mr. Brush:

138 Q. You were bringing the ends of the knuckle together?

A. I was adjusting the ends of the knuckle in the coupler—in the draw bar.

Q. Pulling it out so that it would meet when a coupling was next attempted to be made?

A. The idea was to close that one entirely and open the other one on the other car.

Q. In order to do that you must pull the knuckle out and bring it around?

A. Pull the knuckle down, shove the pin up and shove her down in and drop it in so that it would hold.

Q. It was working that knuckle around that you did and it was holding the pin that he did?

A. He stepped in there and said, "I will hold the pin," and I had the pin in my hand.

By the Court:

Q. Do I understand you to say that you pulled the knuckle down while he dropped in the pin? 140

A. The knuckle was open in the car and the lug of the knuckle broken off; that left the small piece in the draw bar which I intended to take out with my fingers and when I got that out I could shove the knuckle close and drop the pin and hold the knuckle in there.

Mr. Adams: I will have a model here in about ten minutes and we can use it.

By Mr. Brush:

The object was to close the knuckle up so that 141 the coupling could be made.

Q. How long did you work there that way, you and he?

A. How long did he have hold of the pin when the accident happened?

Q. Yes, sir?

A. He had hold of the pin about three or four seconds—he stepped in and got hold of the

pin and he had hold of it and I was getting ready to close the knuckle and I was thrown violently to the ground and went beyond the tracks.

It was only a few seconds after he stepped in and took the pin before this accident happened; he never had a chance to put the pin down; as I stood in front of the coupler with my hand over the draw bar which we called the "deadwood" on the car, I had my right hand on the deadwood and my left hand on the knuckle ready to close
143 it up so that the pin would fall in place; I never even shoved the knuckle—just getting ready, and he had hold of the pin and the "cut" came in there.

Q. What do you mean by the "cut" came in?

A. The "cut" came off from the hump and hit those four cars.

By the Court:

Q. Another car came down onto you?

A. A cut of five cars came down from the hump against those four cars.

144

By Mr. Brush:

Q. You say there was a space of about twenty feet that you were working in there—?

The Court: Let him illustrate this a little; I don't understand this; I don't know which end this "cut" came down. Where is track 4?

(Witness explains situation on diagram.)

By the Court:

Q. You were working on track 4?

A. Yes, sir.

Q. Where did these five cars come from?

A. Right here. (Shows.)

Q. Where was the string of cars?

A. South.

Q. And you were in the gap?

A. In between here—in the gap. (Shows.)

Q. When you first looked you thought this cut was coming down on track 3, didn't you?

A. When I was standing on 4 there was a cut went in on 3.

Q. That was this same cut?

A. No, sir, another cut—that caused me to jump out.

Q. How far were you from the hump?

A. About 800 feet altogether.

Q. Did you have an unobstructed view?

A. There was a clear view of the hump. I had an unobstructed view because I was between 4 and 3.

I couldn't say with what force this string of cars hit the car I was working on, because I was thrown violently to the ground; I wasn't thinking of the force of the cars. It moved the car that I was working on 20 feet up to where the other cars stood. It closed up that gap entirely. I

148 *J. J. Murphy for Pltf., Direct.*

was pinned under the trucks of the cars and Boldt was knocked across the rail and killed.

By the Court:

Q. Boldt was knocked where?

A. Knocked across on the rail.

Q. Where?

A. Across the rail.

By Mr. Brush:

149 These impact couplers are what the name signifies—couplers to couple by impact—when they are brought together the knuckles join. There is not much force required to make the coupling. A mere touch is sufficient to make the knuckles join, just long enough to cause a pressure so that they would come together.

Q. So that only a very slight impact is necessary to make the couplings join?

A. They must be hit a little "to make."

Q. An impact hardly sufficient to move a car any space at all would be sufficient to make the
150 couplers join, wouldn't it?

A. That would make a coupling, yes, sir.

Q. And to bang the cars together so that they ran over any considerable space is wholly unnecessary for the purpose of making a coupling?

A. It is unnecessary.

I don't remember with what force the car that I was working on struck the car that was at the other side of the gap.

By the Court:

Q. You were hurt and unconscious, were you not?

A. I was just stunned—I don't believe over ten seconds—

There was no warning of any kind of this "cut" of cars coming in on track 4 at that time. There was no work being done at this time upon the cars on track 4, only what work the crew was doing.

152

Q. I suppose you don't know whether the crew at the forward end of the car was working on it or not?

A. They were not working on it.

There was no one else around at this point where I was working besides myself and Boldt. So far as I know there was no other eye-witness to this accident.

By the Court:

Q. This wasn't the cut—this wasn't the locomotive or engineer that signalled?

153

A. No, sir.

Q. Where was he?

A. On the south end of the yard, standing still.

By Mr. Adams: On track 4?

A. Yes, sir, on track 4.

154 *J. J. Murphy for Pltf., Cross.*

By the Court: At the head of the string of cars?

A. Yes, sir.

Q. You had signalled him that you wanted him to back down these cars so as to join the other four?

A. Yes, sir.

Mr. Brush: That is all excepting when the model comes I want to ask a few more
155 questions to explain the situation.

CROSS EXAMINATION by Mr. Adams:

We railroad men in the yards call everything towards the hump, north, and everything the other way, south. I had been in yard service since June 1, 1906. When I started in the service I worked in different parts of the yard, and was promoted to the position of yard conductor. I worked about that yard and I was made assistant yard master there. By my own choice and free will I went back to the position of yard conductor. I was
156 not demoted by the Company. All the time that I worked around this yard as yard conductor and assistant yard master Boldt worked there with me. It was his regular duty at that time to make up this particular train. He was signed to that train. It had been his duty two or three months, if not four months. And all this time he had worked in that yard making up that same train as conductor of the switching crew.

Q. You spoke of there being two tracks over the hump. What do you mean by that—are these two tracks shown on this map?

(Witness shown map.)

A. He asked me what that track is—one is the scale track and the other is the track they work on.

It is all one track. Sometimes they use the scale rails and sometimes the other rails. In the general operation of this yard all the cars come from the north. They are pulled up by the hump 158 engine and switched back. The hump engine comes in here and gets a string and pulls it up for classification, but all the cars that are allowed to go down by force of gravity come from the top of that hump.

Q. At the time you went in there first and found this opening in the cars, you didn't know, did you, that the first section of this train had been made up at that time?

A. Yes, sir, the first section was made up; we left the first to complete the second.

Q. The first was where? 159

A. On number 1.

Q. And this second section was on number 4?

A. The head end on 4 and the rear end of the train on 2.

Q. Then when you went in there to complete making up the rear of that train you went in on 4, is that it?

A. The head end of the train was on 4.

160 *J. J. Murphy for Pltf., Cross.*

The making up of that section had not been completed at that time.

Q. In other words, other cars were likely to come in there?

A. Yes, sir, other cars were likely to come in there but the instructions we have there were only 4 to pick up in there.

Q. You didn't know how many more might come in there?

A. No, sir, we didn't know how many more
161 might come in there.

We knew that cars were likely to come in there at any time. That is true of all these tracks—they are all "live" tracks. There is no code of signals for each of the crews working on the classification tracks and the crew of the hump engine—they have no signal whatever, but the men working in the classification yard expect that cars may come in there at any time. What is called the "lead" is the track that comes down to the right here (pointing), as you stand looking toward the hump, the track that the switches lead off from.
162 That covers all the tracks up to 5 on the left—facing south—and up to 10 on the right. No. 5 track—next to the one rail I was on is a straight track—right straight through to the hump. That track on that night was clear from one end to the other. On track 4—there was a distance of 200 feet clear from the switch point towards the place where I was. That is 200 feet from the lead to the first car on number 4 clear space. When I

first went in there this space between the string to which that engine was attached to the four cars was about 200 feet. I came in with an engine and coupled onto the 15 cars. Then I proceded down ahead of them to determine if he got the four cars, and came there and found this open space. Then I gave the signal to the engine man to back up. He backed until I gave him the signal to stop—so that the cars touched each other. That was the first attempt and the first failure to couple the cars. Then I gave him the signal to go ahead—pull away from the cars—so that I 164
could open that knuckle. I opened the knuckle and I gave him the signal to back in again. And as they were coming together and touched I gave him the signal to stop and the coupling came together and when he stopped they ran away again. Then I determined there was something the matter—I thought there was something the matter that the coupling didn't "make." Then I gave him another signal to go ahead and give me more room. He must have given me 20 feet, if not more, I could not say exactly. After that I made no further attempts to try and couple on. All of this 165
afterpart that I have described in working on this knuckle was no part of the attempt to couple. The knuckle that I found would not stay closed was the one at the south end of the four cars, on the side of the space towards the hump, so that when I stepped in next to the coupling there were four cars between me and the hump. From my position between 3 and 4 I could not see the hump.

166 *J. J. Murphy for Pltf., Cross.*

Q. You said on direct examination that you could; there is enough curve in there so that you from your post on that side of that string could not see that hump or the hump track?

A. It would be impossible to see it.

I saw Boldt when I gave the engineer the signal to stop and just stepped in there myself. He just came there at that time. I looked at the knuckle and I said to him, "The knuckle is broken." He didn't say anything to me until I said the knuckle
167 is broken. The coupler was a Sharon, the same standard as that coupler there. (Witness indicates model.)

Q. This is not a Sharon but the principle is the same?

A. Yes, sir, the principle is the same.

Q. Tell the Court and the jury just what part of the knuckle was broken?

A. This lock in here was broken off—the end of the knuckle—way in there; when it is closed that pin drops down and holds it in there; it was broken off in there so that when the knuckle closed
168 the pin did not have anything to hold it.

(Witness illustrates by model.)

I wasn't sure that it would not hold it until I got that broken piece out; it was still in there. I was going to get that out.

Q. If there was any chance for the pin to catch in the lug of the knuckle and the cars were

coupled, you could not see that break there, could you?

A. That was an unseen defect; I could not see it at all.

It was a brand new coupler. The next operation I was going to perform was to close that knuckle. I had not taken out the broken piece at that time. It was back and I was trying to close it without taking it out. I was simply going to push these knuckles together and then reach in there and get that broken piece. To do that 170
I didn't have to lift the drawhead.

Q. When you went in there—after Boldt told you it was all right—your operation was simply to push these knuckles around and reach in there and get the piece of broken steel?

A. To drop that pin down with my fingers.

(Witness indicates.)

Q. To force it down?

A. To force it down after I closed the knuckle —if the piece didn't come out I could force the pin down. 171

Q. You could close the knuckle that way—force that pin down (Shows)?

A. Yes, sir, force it down.

Q. You were simply trying to get that piece of steel out of there and find out whether or not the coupling would work.

A. And close the knuckle.

172 *J. J. Murphy for Pltf., Cross.*

I intended to pull that car up and put in the station order and have it cut off for repairs. It had to be repaired.

Q. Are repairs such as putting in drawheads or knuckles ever performed in this yard?

A. Not in this yard, but putting in new knuckles on the drawhead is.

Q. That is a comparatively simple operation?

A. Light repairs are made in that yard.

Q. In what manner?

173 A. Putting knuckles in and fixing broken knuckles.

Q. What is done in reference to protection against cars coming from the hump?

A. The car repairers do that—when repairers do that work they lock the switch and put up lights.

Q. They throw the switch over and lock it?

A. Yes, sir.

Q. Have they a key of their own?

A. Yes, sir, and one key of this certain lock.

Q. So that when one of those car repairers go in there to work they lock the switch and no other

174 employe can unlock it?

A. Yes, sir, no other employe can unlock except the man that has a key—nobody can get in there.

Q. Nobody else has a key?

A. No, sir.

Q. You say repairs such as putting in a new drawhead would necessitate its going to some other track?

A. It must be taken to the shop.

When Boldt arrived there I told him the knuckle was broken. Then I got in between the cars in this twenty foot space. I was at the north end of the twenty foot space. Just when I went in there I heard the cars coming on the other track. They were empty cars—I could tell they were on that track, and I jumped out thinking they might be on track 4. I understood at that time that cars might come in there any minute or any second. When I jumped out from between 176
3 and 4 Boldt was standing between 4 and 5, over here to the left of track 4 looking towards the hump.

Q. Was there any obstruction to his view in any way to the hump?

A. He had a clear view to the hump.

There was nothing at all there. There were arc lights along down this side of the yard, an arc light at the scale house and another between 7 and 8. The office is lighted up. The hump is about five feet higher than where I was, where we were standing at the end of the grade. The track 177
comes down about five feet in eight hundred; I know it was on the level part of the yard that we were standing. It was about 500 feet from the top of the hump to the place where the accident happened. These four cars to the north of me extended up to the grade, so that when they were struck they run down toward the other string, up against the other string. Before I went back in

178 *J. J. Murphy for Pltf., Cross.*

there the second time I asked Boldt, "How does she look." He said, "All right, go ahead." He was lighting a cigarette after he said "All right, go ahead." Assuming this end of the desk here as the end of that freight car where the defective knuckle was, Boldt was standing to the left here, outside and clear of the cars, when he said that. I went up to the knuckle and performed this operation that I have described. Here is the car and as I walked in there Boldt walked along and stood looking at me like that. (Witness de-
179 scribes.) He had a match in his hand. I said to him, "The knuckle is broken." Just at that time the cut came in on number 3 and I stepped out. He was on this side of the track; when the cut came in on number 3 I stepped in here. (Witness indicates.)

By the Court:

Q. Do you mean that the cars came in on the adjoining track?

A. On the next track to the track we were standing on.

180

By Mr. Adams:

Boldt was standing just to the west of track 4, between 4 and 5 when the cars came in on number 3. That was when I jumped out. When I stood over on this side—I was afraid to go on the other side. I said to Boldt, "How does she look." He said, "All right, go ahead." At that

moment he lit a cigarette. He was then standing looking up towards the hump—number 5 was a clear track. There was a space across of about fifteen feet. He next said, "All right, go ahead." And he turned around and looked at me; he was looking up that way; he said, "Wait, and I will hold the pin" and he reached in there—I had my hand on the deadwood of the car—the right hand —the left hand on the knuckle shoving it in for a brace; he reached in there—leaning against the car like that, with his shoulder (Shows). He just got hold of the pin and the cut came in there 182 and knocked me down between the rails and knocked him across the track. In order to reach that pin he had to step over the rail—the rail might have been between his feet but he had to step over the rails with one foot any way to reach that pin. The string of cars that struck me came down from this hump. On track 4 was my own engine. It was standing still except when I signalled it to start or stop. At the time Boldt was killed I was on track 4. I was standing more towards number 3— Wherever 500 feet would figure out from the top of the hump. When I 183 asked Boldt, "How does she look," he was facing to the north, directly towards that hump. After I asked him he lit a cigarette. It was possible from where Boldt was standing to see the switch light leading on track 4. There is a light at every switch in the hump; when the switch is set green it is set for that track; if the switch light was green for number 4, the cars would go in on

184 *J. J. Murphy for Pltf., Cross.*

number 4; if it was set white they would go down the lead towards one. If that switch was open so that the cars would come in on 4, the light would show green. If it was set so that the cars should continue down the lead or laterally it would show white.

By the Court:

Q. Did number 4 have a green light?

A. I could not see the switch light; when the
185 switch light is green it is set for number 4.

By Mr. Adams:

Q. Tell us what you mean by this train being made up in order of stations?

A. This train is known as second 94, made up of fast freight, perishable live stock, merchandise; the train was to be made up on track 2, and the hind portion of the train was already made up.

It was made up at the time of the accident. The caboose was on the rear end of the train, which consisted of about twenty cars; it was
186 coupled up at that time to go to the extreme end of the track. The head portion of the train, which were local point cars, cars the other side of Driftwood, Pa., were standing on track 4. The track on which I was injured. The reason for dividing those cars on track 4 was so that the hind portion of the train on number 2 would be open for through cars below that point.

Q. When the first section—the front end of the

train which is on track 4, was made up you would hook onto it and switch it over on track 2, and hook onto the rear section?

A. Yes, sir; the engine would come in on number 4 track for what cars were on 4 for that train and pull them out to the south end of the yard and put them on track 2.

Q. And couple them up and the train would be made up.

A. Then the train would be completed.

The cars next to the engine would be for points 188
nearest Buffalo. They switch them off from the front end of the train. And the rear portion of the train would be for points in Pennsylvania and through cars below Pennsylvania points. I had helped make up this train for about four years. Boldt had been working with me all that time, more or less. Four or five months before that he had charge of that engine that was making this train up.

Q. With the first section of this train on track 4, was it customary to use any space on track 4 for making up other trains?

189

A. Yes, sir, the hump engine had the right to use all the tracks except tracks which had blue lights and locked.

Those tracks were always left unless the blue flag was out or the switch locked, so that at any time cars were likely to be run in on those tracks, if there was space for them. This had been the custom all the time I was working in that yard

190 *J. J. Murphy for Pltf., Cross.*

with Boldt. It is universal in our classification yards, and is customary with other railroads. The New York Central uses all tracks to classify except tracks that are locked. During that time cars are run in there irrespective of anything that might be on those tracks, so far as the employees are concerned. They never sent a man ahead to warn anybody. The men are supposed to get out of there. There was a rule which required them to keep out from between cars on those classification tracks, without proper protection. I know the
191 custom in the Erie yard. The same method of procedure prevails there.

The Court: I don't understand about the men being supposed to keep out of there—they are supposed to be in there to do their work.

Mr. Adams: To keep out from between the cars, I should have said.

There was no repair work going on on these tracks. Whatever repairs was necessary we se-
192 cured the services of the car inspector or the car repair man. They locked the switches at both ends of the track—north and south end; put up a blue light nights and a blue flag in the daytime. At all other times those were live tracks, with the cars constantly coming in there, and with the hump crew having the authority to run the cars in on any track at any time, so that whenever it became absolutely necessary for me to go between the cars

I made some provisions for protecting myself.

Q. What provisions had you made on this occasion?

A. I asked Boldt "How she looked."

Q. In other words he was your lookout?

A. Yes, sir, he was.

Q. When you first went in there and found this lug on the coupler broken, I believe you testified that it was this part of it here (counsel indicates on model)?

A. Yes, sir. 194

I don't know when that became broken. This end at the broken end here was still inside of the coupler, that broken piece. I don't know where those cars come over.

Mr. Adams: That is all.

Mr. Dille: The court will perhaps recall that on account of the absence of this model,—which Mr. Adams sent for—we held the chief part of the case regarding the coupler and permitted him to go forward with his cross examination— 195

The Court: I do not understand any negligent act or negligence is predicated on any defective coupler, is there?

Mr. Dille: Yes, sir, an insufficient

196 coupler—which would not make sufficient by impact.

* * * *

The Court: Where is your allegation in the complaint that there was a failure on the part of the defendant to comply with the law. There is no specific allegation, is there?

(Argument).

(Complaint read by counsel, etc.)

197 The Court: It is not necessary to read the entire complaint. You don't specifically assert the negligence of the defendant by reason of defective coupler; I don't understand you claim the accident happened primarily because of a defective coupler. You assert negligence consisting of their sending cars in there without giving notice what you are going to do and without affording them protection in that particular.

(Argument on Employers' Liability Act).

198

The Court: The point I want to make is that the complaint does not specifically charge that the negligence the result of which the decedent met his death was a defective coupler or defective drawhead.

Mr. Dille: I appreciate that but I was leading up to that.

The Court: What is it you wish to give now? 199

Mr. Dille: A description of this coupling apparatus.

Mr. Adams: I object to any further examination on the ground that it has already been gone over; further, on the ground that no claim is made in the complaint that this accident was the result of a defective coupler; further, on the ground that the evidence conclusively shows it was not.

200

The Court: I will permit further examination on this line; I think it was directly reserved.

Mr. Adams: I don't remember that it was directly reserved. I produced the coupler when they completed their examination.

The Court: The witness was interrogated by you about the coupler and I will permit further examination on this line, but, I repeat as I said a minute ago, the complaint does not specifically make the 201 charge that the defective coupler was the cause of this accident.

Mr. Adams: I understand this is admitted only as an incident to the facts.

The Court: It is part of the transaction; it merely exemplifies what the witness has already testified to.

202 *J. J. Murphy for Pltf., Re-direct.*

RE-DIRECT EXAMINATION by Mr. Dille:

(Witness shown model).

That is a "Tower" coupler. The coupler on which I was working at the time Mr. Boldt was killed was a "Sharon" coupler.

Q. Wherein or in what way do the Sharon couplers differ from this make—the mechanical makeup of the "Tower" coupler of which this is a model?

203 A. That knuckle pin enters from the bottom and there is a slide in there to hold it in; there is a small difference in the knuckle in here. (Shows). In the throat part of it.

Q. Would you call that the tongue end of the coupler that goes into the throat or what would you designate that?

A. A lug.

Q. It looks like a tongue projecting in there?

A. Yes, sir.

Q. In just what way did this latch—did this latch pin differ in the one on which you were working and this "Tower" coupler here?

204 A. There is a hinge in the pin here.

Q That has a link on top.

A. Yes, sir, it drops over the same as a door hinge—the rest of the apparatus was just the same.

Q. I observe in this coupler here that as the knuckle is thrown back the latch or pin or ball drops over the lug and locks it; in the coupling

apparatus in question that you were working on when Boldt was killed was that apparatus more in the nature of a pin or in the nature of a ball latch the same as that?

A. It was just the same as that one there. All except that it had this pin instead of being straight, it has a small latch on it and drops over and pulls up. That has a link or staple immediately at the top of the drawhead.

Q. I observe on this model here which I hold that upon raising it up it throws that knuckle open, or in other words the jaws outward; did 206
that do the same?

Mr. Adams: I assume that all of this testimony is received under my objection.

The Court: Yes, sir.

A. Yes, sir.

Q. Some of these couplers—automatic couplers of this general type—must be opened by hand, don't they, you just step in between the cars or reach in to throw the knuckle open—that is lifting the latch pin on the Trojan or Janney or the 207
Gould will not throw the knuckle forward the same as on the "Tower"?

A. No, sir, they don't throw the knuckle open.

Q. You must lift up the pin?

A. Open by hand.

Q. If they don't open by parted couplers you must open them by hand?

A. Yes, sir.

208 *J. J. Murphy for Pltf., Re-direct.*

Q. Was the coupler in question upon which you were working one that operated that way or did it open by lifting the latch up?

A. It opened by lifting—I pulled the knuckle open, getting hold of the handle; I didn't touch the pin at all.

Q. By handle you mean what?

Mr. Adams: I object to any further evidence of any other couplers or any method of procedure in coupling cars on the
209 ground that it is immaterial to the issues in this case.

The Court: I cannot say; this man didn't do anything to the coupling—he didn't go in to test it—it was this witness that went in there.

Mr. Dille: I was going to lead up to it. I was leading up to the operation of that work in that yard.

Mr. Adams: I object to the evidence as to the operation of knuckles in general and
210 the practice of coupling cars without reference to the situation here; there is not only no allegation in the complaint of defective and improper coupler but there is no claim nor has it been claimed that this man was injured because of that.

The Court: If this witness was injured by reason of a defective coupler this ex-

amination would be pertinent but I don't see how it applies to the decedent here; inasmuch as this witness has already been examined on this same line I will permit it.

Mr. Adams: Exception.

Mr. Dille: I believe but I am not positive that you have already testified in your responses to Mr. Adams' question that all that is required in making these automatic couplers—in the coupling is the mere closing up that way and the lock—that is that it does not need a hard jam (counsel describes)? 212

A. Yes, sir.

Q. That is if they are in working order?

A. If they are in working order they work nicely.

I do not remember how much of the lug was broken off. There was enough broken off so that when the pin dropped it would not hold; but the knuckle was open; the knuckle opened automatically. I found nothing broken about that drawhead in question—on the drawhead or any of the framework, or the outer part of the jaws of the knuckle. To replace a new knuckle I would take the slot out which held the knuckle pin in there, drop the knuckle pin out, pull the knuckle out and put another in there. That would be accomplished by drawing out the pin on which this 213

214 *J. J. Murphy for Pltf., Re-direct.*

knuckle swings like a pivot, and putting a new knuckle in the place of it and putting in a pin and fastening it. The end of the lug in question that was broken off was loose in there.

Q. But you had to manipulate the knuckle here so as to work it out with your hands?

A. Yes, sir, I could shove it back into the hole here.

(Witness shows).

215 Q. Was that sufficient, Mr. Murphy, to enable you to couple your cars onto the rest of the cars and pull it out and set it on the repair track?

A. Yes, sir, it was sufficient; I was going to have the knuckle put in on number 2.

Q. In your judgment that was sufficient so that you could make that coupling strong enough so as to pull that car out of there and set it on another track?

Mr. Adams: I object to any further examination as to the judgment of this witness, calling for a conclusion, incompetent, immaterial, irrelevant, improper; not within the issues of this case.

216

The Court: I must sustain the objection. The decedent was not manipulating the coupling and the primary cause of his injury was not a defective knuckle.

Mr. Dille: Of course I have not charged it specifically but if I do not couple up to

the satisfaction of the Court Mr. Boldt's duties and position, I can see that it is of no avail.

(Argument).

Mr. Adams: I object on the further ground specifically under this statement that it is not set up in the complaint; further, on the ground that it is a surprise; I do not think they have the right to come in with a complaint on one theory and proceed with another. 218

The Court: I will permit a few more questions because you opened the door Mr. Adams for an examination of this sort.

* * * *

Mr. Adams: I object to it on the ground that it prejudices the jury and befogs the issues in their minds.

The Court: I will try not to have it do so. Proceed.

By Mr. Dille: 219

Q. In removing that piece, Mr. Murphy, it was almost necessary to use both hands for a part of that operation was it not,—to get that piece out?

A. No, sir, I could use one hand.

Q. But you were as a matter of fact using both in there to get it out quickly?

A. I had the lamp in the other hand.

220 *J. J. Murphy for Pltf., Re-direct.*

Q. You would hitch the lantern ball over your arm and use both hands—you say you had the lamp in the other hand?

A. Yes, sir.

I never worked in the New York Central and Erie Yards. I draw trains in there—I had charge of trains that ran in on their tracks. I done work there while working for the Pennsylvania Railroad.

Q. Did you ever have occasion while taking
221 trains in there to do any switching over the humps in those yards?

A. Not over the humps.

Q. You are giving your testimony based upon your general observation while pulling trains in and taking them out?

A. Yes, sir.

Q. Also in response to questions by Mr. Adams you said there was a rule in this yard in force to the effect that no one should go between the cars under such circumstances; you testified that there was such a rule; was that rule in writing or was that an oral rule or understanding?

222 A. It was in writing.

Q. In the book of rules or the bulletin?

A. General notices and special instructions.

That is posted in the train master's room at Babcock Street on the bulletin boards—the general order boards.

Q. There is nothing about it in the book of rules?

A. Not as I ever saw this book of rules.

I have also testified in response to Mr. Adams' question that all these tracks in question 1, 2, 3, 4, 5, 6, 7 and 8, are what are called live tracks.

Q. Don't you know that switching would be and could be done and was done as matter of custom from the hump down onto the tracks irrespective of whether or not other cars were in there?

A. Yes, sir, except the tracks that were locked and had a blue light; you could not use those 224 tracks.

There was a rule to the effect that when any repairs of any kind whatever were to be made on the cars or trains in that yard, that a lookout was to be posted in a position of observation to warn and protect the employes that were doing the work. It was in writing, in the timecard and the general notice.

Q. I hand you a document or timecard entitled "Pennsylvania Railroad, Buffalo and Allegany Valley Division," and in large type "Buffalo Division, timetable 23 in effect 8:01 A. M., Sunday April 30th, 1911, for the government of employes only; eastern time;" and the names of several officers,—will you take that Mr. Murphy and turn and see if you can find that rule in that book? 225

(Witness shown document).

226 *J. J. Murphy for Pltf., Re-direct.*

A. Yes, sir—number 180, page 14.

Mr. Dille: I offer this document in evidence.

The Court: The entire book.

Mr. Dille: There are several other rules that I will want to offer later but I will now offer rule 180, page 14.

Received in evidence without objection and marked Exhibit P-3.

227

(Rule reads).

"Employes must not go between or under cars in a train until some other member of the crew is made aware of the fact, and the latter takes the necessary precautions to prevent the train from being moved while the employe is between or under the cars."

Q. Now I desire to ask you Mr. Murphy if there is not a rule applicable to road men handling trains out upon the road?

228 A. No, sir, it governs the road and the yard movements too.

Q. Do we understand that all such rules as this on the Pennsylvania railroad lines—that are worded like that—that might be understood to apply to road cars only, apply to yard cars as well?

A. They apply both to yard and road cars—

we must all send off those timetables and live up to the instructions in them.

The conductor is acting assistant yard master. The assistant yard master must do all of the work laid out by the yard master for him to do in making up trains. The yard conductor's duties consist of making up trains and switching cars. There was a first and second section of 94. The second section was the fast freight. By fast freight we mean merchandise, perishable and live stock—merchandise that shippers ship from Buf- 230
falo to points in Pennsylvania and all perishable received from connecting lines. We make it up first and get it out of the way. The rear part of the train was intact—altogether on track 2, and this portion of the train upon which I was working was upon track 4. Mr. Boldt was the conductor in charge of making up this train. His crew consisted of two men besides himself, one of them is called a flagman and the other fellow was called the head brakeman. Of course, they had an engine crew too, consisting of engineer and fireman. At the time of the accident I could not
say where the balance of Mr. Boldt's crew about 231
that train 94 that we were making up; that is other than the engineer and fireman. I remember to whom I gave the signal when I signalled the engineer to back up and couple on.

Q. Did you give it to the engineer or did you give it to the head brakeman or the switchman and did he repeat it?

232 *J. J. Murphy for Pltf., Re-direct.*

A. My memory isn't good, I don't know whether the drawbar man repeated the signal or the engineer but the engineer backed the engine.

Q. You are speaking of the drawbar man?

A. Yes, sir, the head brakeman.

Q. The one next to the engine?

A. Yes, sir.

I don't know where the other brakeman—the flagman as we call him, was at that time.

Had I not been there at that time Mr. Boldt's
233 work would have been to look after every detail of that train in making it up.

Q. Was the fact that you were there such that it would change his obligations in his duties regarding the making up of that train?

Mr. Adams: If the court please, this calls for the conclusion of the witness; let him state the facts and not his conclusion.

The Court: The witness has already stated directly that in his absence Boldt would have general oversight of the making
234 up of this train,—Boldt had charge of making up assisted by two men.

Mr. Adams: I will withdraw the objection.

(Question read by stenographer).

A. I don't understand the question.

The Court: You testified that Boldt had charge of making up this train; now the import of this question is whether your appearance on the scene put you in charge, is that it?

Mr. Dille: Yes, sir, practically.

Q. So that you relieved Mr. Boldt largely or entirely of any responsibility?

A. The yardmaster always assists the conductor to make up the train, as the cars are not chalked—they are switched by bills I have in my 236 hand.

Q. Then he was in that instance assisting you?

A. He has charge of his engine but he does as I tell him.

By the Court:

Q. Boldt had to do as you told him?

A. Yes, sir.

By Mr. Dille:

Q. I believe you testified, if I remember cor- 237 rectly, to the fact that in going over to the rear part of this portion of train 94 on track 4 a little in advance of Mr. Boldt—where had you and Mr. Boldt been just previously to that?

A. Down towards No. 10—just after making a switch of a car; I said we would make that switch and go in on number 4 with that engine and I

will go back and make the coupling onto the four cars.

I had seen that the four cars were apart before I came down. Mr. Boldt and I had been over making up the rear portion of train 94 prior to that. I don't remember whether or not the drawbar man, headbrakeman, or the rear flagman, were with Mr. Boldt and I at any part of that train on number 4. I don't know whether or not Mr. Boldt came around with the engine and looked
239 after the coupling on. I was quite a ways in advance of Mr. Boldt in getting to this detached portion of the train—these four cars—but I don't know how far: quite a little ways. There was 15 cars in this forward part of the train on track 4 that the engine was coupled to. And the other four would make 19—which were all to go on that part of number 94.

Q. What was the custom in coupling onto cars and pulling them out—you testified that you went to couple on these four cars and pull that part of the train off from track 4 around and couple
240 it on to the rear portion on track two; did you couple on with the engine and then start and pull right out without an examination to see whether the cars were all coupled together or not?

A. Those cars were set in there by us 30 minutes before that—about thirty minutes before—the 15 cars were one cut—they were set in at one shift—placed in there out of the way.

Mr. Boldt and his engine crew brought them out themselves from the main track.

Q. Then he had looked them over—Do you remember whether or not the air brake hose was coupled up?

A. It was not coupled to the engine but the air brake hose was coupled when they arrived there and set them in the yard.

Q. As an expert railroad man and assistant yardmaster on the night in question, what were the duties of the switchman or yard brakeman 242
preparatory to taking out any portion of a train off from a track, regarding his first looking to see if the cars are all coupled together or coupled onto the engine and taking a chance?

A. Their duty is to see that they are all coupled and to see that nothing is dragging and the brakes are off.

Q. In case there is anything dragging—air hose dragging or anything of that sort, how were they to be put in place—how could they be put in place—by a standing outside of the train or by stepping in between the cars?

243

Mr. Adams: I object to it as incompetent, immaterial, irrelevant and not within the issues of this case.

Mr. Dille: It is specifically charged in the complaint that it was a part of their duty.

The Court: I will overrule the objection.

244 *J. J. Murphy for Pltf., Re-direct.*

Mr. Adams: Exception.

A. To notify the car inspectors and have them repair the cars.

Q. You don't understand the question, I am not speaking about anything broken—how do you put the air hose in place and how do you adjust couplers?

A. Get in between the cars and adjust them.

Mr. Dille: I have two rules here that I
245 wish to call attention to.

The Court: Probably the other side will concede they are rules.

Read them in evidence.

Mr. Adams: I don't object to number 706 and 707; I will stipulate they are the rules of the defendant in effect at the time of this accident.

Mr. Dille: Rules for the government of the transportation department of the Pennsylvania Railroad number 706 and 707 are
246 stipulated. Rule 706 reads as follows:

Rule 706. The General Yardmaster reports to and receives his instructions from the Trainmaster.

He has charge of yards, of the men employed, and movement of trains therein and distribution and movement of cars within assigned districts.

It is his duty to see that train crews and engines are ready for duty at the appointed time; that trains are properly made up and dispatched at the proper time; that conductors are furnished with way-bills for cars leaving; that way-bills are received for cars arriving; that doors of cars are properly secured; that cars are inspected and proper disposition made of those needing repairs; that cars are not unnecessarily delayed in yards, and that records and reports are made in accordance with instructions. 248

He must be familiar with the rules governing, and the duties of employees connected with train service; require efficient discharge of such duties in yards, and report all violations of the rules coming under his notice.

An Assistant General Yardmaster, a Yardmaster or an Assistant Yardmaster, in the district assigned to him, has the same authority and performs the same duties as the General Yardmaster. 249

The Court: The decedent was not the yardmaster?

Mr. Dille: Mr. Murphy was the assistant yard master.

The Court: Murphy testified the decedent was the assistant yardmaster.

250 *J. J. Murphy for Pltf., Re-direct.*

Mr. Dille: Mr. Murphy testified that the decedent was the yardmaster in charge of making up train 94 and that Mr. Murphy was the assistant yardmaster.

The Court: I understood Murphy to say that he was yardmaster.

Mr. Dille: He is yardmaster now; at the time of the happening of the accident he was the assistant yardmaster and Mr. Boldt was yard conductor in charge of mak-
251 ing up this freight train number 94.

Rule 707 reads as follows:

Rule 707. The Freight Conductor reports to and receives his instructions from the Trainmaster. He must obey the orders of Yardmasters.

He must report for duty at the appointed time, and see that the trainmen are ready for duty; see that he has the proper waybills for the cars to be moved; assist in making up his train when necessary; see
252 that the engine and train are provided with full sets of signals; see that the couplings and brakes are in good order before starting, and inspect them as frequently as opportunity permits; see that the trainmen occupy their proper places on the train, handle freight with care, using every effort to prevent loss or damage; see that doors of cars are properly secured, and not per-

mit unauthorized persons to enter the cars, handle freight or ride upon the train.

He must have a reliable watch and a copy of the timetable; examine the bulletin board before each trip; compare time with the engineman before starting and see that he has a copy of the timetable.

He must show his train orders to the flagman.

He is responsible for the movement, 254
safety, and proper care of his train, and for the vigilance and conduct of the men employed thereon, and must report any misconduct or neglect of duty.

He must not move cars from stations without proper way-bills and must see that they are in safe condition to be moved. When necessary to move cars on station or loading tracks, or to place cars thereon, he must first see that all persons loading or unloading cars thereon are notified, and when cars are left on a siding he must see 255
that they are properly secured by brakes and every precaution taken to prevent them from being improperly moved.

Mr. Dille: You have testified Mr. Murphy in response to Mr. Adams that track number 5 on the night of the accident was clear, and, if I remember correctly, that track number 6 had cars on it; do you

256 *J. J. Murphy for Pltf., Re-direct.*

remember whether or not the cars extended on track six largely up to the lead?

A. I don't remember that.

I remember positively that track 5 was entirely clear.

Q. You have testified also in response to Mr. Adams that the time elapsing between the time you and Mr. Boldt stepped in there with this coupler, was but a few seconds; are you able de-
257 finitely to fix that time as to three seconds, ten seconds or thirty seconds?

A. No, sir, I am not.

In my judgment the point where Mr. Boldt was run over and killed was about 500 feet from the center of the hump, a point about opposite the center of the hump, about 500 feet from a point about opposite the center of the yard office—at that check mark. (Shows.)

Q. How far would a man in Mr. Boldt's position have to step in between away from track 4 in order to see that distance up the track lead?
258 A. To see the top of the hump?

Q. Yes, sir.

A. He could rest alongside of the car and see the top of the hump. If he was standing in the "devil strip" between tracks 4 and 5, he could see the cars coming off the hump and see them on the lead. He could by daylight and in the night time.

Q. You testified, if I remember correctly, that these cars were ridden down by riders and there was a cut of five cars that jammed into the cars you were connected with; do you know how many riders there were on that cut?

A. No, sir.

I don't know whether or not there were any riders. With five cars it would be customary to send one rider down with them.

Q. At which end of that cut—the leading end or the reverse end—would he begin setting the 260 brakes?

A. The first car over the hump.

Q. The leading car?

A. Yes, sir.

These brakes were set with a club, by hand. their speed is regulated by the rider applying the hand-brake. In the night the rider carries the lantern with him.

Q. You don't know who if at all the rider—you don't whether there is any rider on it?

A. I don't know.

261

RE-CROSS EXAMINATION by Mr. Adams:

I don't know how many seconds Mr. Boldt stood in there between the cars. It occurred as I described it on Friday. Just about the time he was stepping over the rail; I would not swear to the exact number of seconds. I stepped in and

at that time he was looking up the tracks. A very short space of time after I stepped in there he stepped in.

Q. And that was almost immediately after you saw him looking up the track?

A. When I asked Boldt—to get it right—when I asked him "how she looked" I stepped in there—he said, "All right," and I stepped in there; I adjusted the knuckle and he said, "Wait and I will hold the pin."

Q. Up to that time he had been standing in
263 the same position?

A. He was standing between 4 and 5.

Q. About how long had you been adjusting the knuckle,—several seconds?

A. Yes, sir.

Q. As I understand it, the cars struck almost immediately after he stepped in there—he just had time to step in there and get his hand over there when it struck?

A. He had hold of the pin when the cars struck.

In giving the distance of 500 feet from the hump
264 to where I was injured, I made an estimate of that. I didn't measure it. These four cars which run into Boldt and I were standing on the grade. There was a grade towards the south, and when they were struck they proceeded down there until they struck the other cars. I would not call it much of a grade. There is some grade towards the south. Down where these four cars stood there is a small grade there; if you strike the car it will

run down. I received specific instructions in regard to rule 18[illegible], in regard to going between cars, from my superior officer, the assistant train master, Mr. Colgrove.

Q. Prior to that?

A. Yes, sir.

It is a fact that men working in the yard are repeatedly warned of that danger by Mr. Colgrove.

Q. This rule 707 which has been read here, does that apply to the yard conductors? 266

The Court: Do I understand that this rule applied to this witness?

Mr. Adams: No, sir.

The Court: It was in line of his duty to go in between cars and see what was the matter with this coupler.

Mr. Adams: Yes, sir, if he performed it, himself.

The Court: You contend that before going in that he should post somebody to look out. 267

Mr. Adams: We contend that he did have somebody there.

The Court: And that is a complete compliance with the rule as you contend.

Mr. Adams: Yes, sir; I do not know that it makes any difference whether Murphy

268 was complying with the rule or not—he was taking a risk on his own life.

By Mr. Adams:

Q. Did you ask Boldt to come in between those cars?

A. No, sir.

Mr. Dille: Will you stipulate that this model may be used for the benefit of the court and the jury?

269

Mr. Adams: I would not admit it as an exhibit in the case but it may be used before the court and the jury.

Mr. Dille: It is stipulated that it may be used by the court and the jury in the examination.

The Court: It has already been used as an illustration.

Mr. Adams: I don't want to waive any question of getting it—

270 The Court: You have merely brought this coupler into court to make clear to the jury the character of drawheads and coupler you are talking about; but if the coupler in question was not specifically like the one before us here—if there was some different arrangements—the knuckle arrangement was somewhat different.

Mr. Dille: Yes, sir; what we call the 271
latch pin or ball was slightly different but the operation was practically the same; the knuckle pin that holds the knuckle in place instead of going from the top down was inserted from the bottom up and a key was inserted from the top instead of the bottom; that is practically all the difference between them; the theory is generally the same; and they are automatic couplers.

Mr. Adams: I move to strike out that statement; I simply brought this coupler in for the purpose of using it as an illustra- 272
tion and he is using it for another purpose.

The Court: Strike it out.

Mr. Dille: Exception.

Mr. Brush: It is admitted that the expectancy of life of the deceased was,—under the Northampton tables, 27.24 years; that the expectancy of life of the mother, the plaintiff here, under the same tables is 14.63 years.

The evidence has been all developed as your Honor observes, from, you might say, 273
the defendant itself, because we have a witness here who is really the defendant himself—

The Court: The witness is actually the defendant?

Mr. Brush: I am making the observation in connection with Murphy's testimony that

274 all these facts have been developed from the testimony of those whom you might say, is the defendant himself—presumably his knowledge of all the facts was open to the officers of the defendant and to the attorneys of the defendant; we had supposed that our pleading was sufficiently broad to cover this question of defective coupling and thereby to bring us within the purview of section one of the act which provides a cause of action where the accident happens in whole or in part by reason of a defect or insufficiency in the care of their appli-
275 ances or equipment; as I say all the facts are out—there cannot be any surprise because the defendant must have known all these facts, —and I move now to amend the complaint to conform to the facts proven in the two prayers,—in folio 9, where it reads that the assistant yard master went into the space between the detached cars for the purpose of an examination of the drawhead and pulling out the coupler thereof,—and add "the same having been found to be defective, the knuckle
276 thereof having been found to be broken."

We further move to amend the complaint to conform to the facts proven in the end of folio 3, line 7,—so that the same shall read: "And the plaintiff further alleges that said defendant was negligent in hauling or permitting to be hauled or used on its line a car used in interstate traffic not equipped

with couplers coupling automatically by impact by reason of a defective and broken knuckle." 277

The Court: Do you consent to that, Mr. Adams?

Mr. Adams: I object to the amendment on the ground of surprise; I assume this amendment is for the purpose and idea that it should be made for the purpose of conforming to their proof and I object to it on the ground that it is not necessary for that purpose at this time.

278

Mr. Brush: It is only necessary in view of the observation that your Honor made a few minutes ago that you understood from the pleadings that we did not make the claim by reason of a defective coupler; and so far as the question of surprise is concerned,—surprise cannot be predicated on misunderstanding of counsel of the precise point for which we contend, for all these facts were in his possession; if we had elicited facts that he did not know about the situation might be different.

279

The Court: Have you any more proof?

Mr. Brush: We are prepared to rest this case.

Mr. Adams: I object to it then on the ground that under the proof it is not necessary.

280 The Court: I do not understand from anything shown so far that this decedent was called upon to go in between the cars, —quite to the contrary; the affirmative evidence shows it was the duty of yard master to go in and see about that knuckle and that he asked this man to look out and see if any cars were coming and that he did that and that he adhered to the rule; what Boldt did was voluntarily done, and about the last answer of Murphy's was that he didn't ask Boldt to come in between the cars.

281 Mr. Brush: That is only negative proof on the subject and it cannot be maintained as a matter of law; it is for the jury to say whether or not Boldt was in between the cars in the performance of his duty; we maintain that he was in there in the performance of his duty aiding and assisting his superior there.

The Court: He was not asked to come in there to aid and assist him.

282 Mr. Brush: That don't make any difference; he was there when this work was being done; he was there in the performance of his duty when he assisted in doing it; when he assisted in doing it—

The Court: Not according to the testimony of Murphy,—Murphy said that he asked him to stand there and look out and give him notice of approaching cars.

Mr. Brush: Mr. Adams, in his opening, 283
stated plainly that Mr. Murphy told him to stay there but Murphy didn't testify to any such thing.

Mr. Adams: He certainly did testify to that.

The Court: I will deny the motion and give you the exception.

Mr. Brush: Exception.

PLAINTIFF RESTS.

Mr. Adams: I move for a non-suit and 284
dismissal of the complaint on the ground:

First, the death of the decedent did not result, in whole or in part, from any negligence of any of the officers, agents or employes of the defendant or by reason of a defect or insufficiency due to his negligence in the use of cars, appliances, etc.

Second, on the ground that the death of the decedent was due entirely to his own negligence and that his contributory negligence was the sole and proximate cause of 285
his death.

Third, on the ground that the deceased assumed the risk of accidents such as the one set forth in the complaint, while in the service of the defendant, by his conduct at the time of the accident.

The Court: I will hear the defense and

286 *Charles King for Deft., Direct.*

reserve final ruling on your motion for a non-suit until the close of the case.

Mr. Adams: Exception.

CHARLES KING, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

287 I reside in Buffalo, and am general yard master of the Erie Railroad. My railroad experience has been as follows: I started in as brakeman—conductor. I have been braking about three years, conductor about 18 years, yard master about 3 years, general yard master about 9. I am now the general yard master of the Erie Railroad, at East Buffalo. Portions of that yard is a gravity yard. I could not tell you the percentage of the grade, but it is between seven and eight feet, that is the top of the hump is seven or eight feet higher than the level of the tracks below. It is a classification
288 yard, classifying of inbound stuff and outbound. You run cars in at both ends of the yard.

Q. You may tell us what the practice is there in reference to the dropping of cars on those tracks —in reference to the warning of employees who may be working on or about those tracks?

A. The cars are continuously put in both night and day, from the east or the west end, whichever

the case may be, and of course they are naturally taken out from the opposite end and distributed to the different portions of the city and other railroads and to our own connections.

They are mostly put in at the hump end, from the gravity end; our practice is for employes taking cars out of the opposite end from which they are put in, to seek their own protection, that is, the crews dropping cars from the hump are authorized to run the cars in on these live tracks at any and all times. And that is irrespective of 290
whether or not there may be a train made up on that track. Under our rules, the employes working on or about those tracks are supposed to look out for themselves. It is the practice in our yard that unless a switch track is locked or a blue flag up, that the crews have the privilege to run cars in there at any time. That is the general custom with the Erie Railroad and all yards, whether gravity yards or not. When a yard is not operated by gravity it is operated by the engine running in with the cars or kicking them in. So that the principle is the same except that in the case of a gravity yard the cars run in without any power 291
except gravity.

Q. Do you know whether or not it is the custom of any other railroad,—you have been in other yards, I presume?

A. It is the custom so far as my observation has been, and I have been around quite a little.

I have been in the railroad business here in

292 *Charles King for Deft., Cross.*

Buffalo 32 years or a little over, and I know something about other railroads besides the Erie.

By the Court:

Q. Do you say it is the custom of other railroad yards?

A. The same custom prevails from my observation.

By Mr. Adams:

293 Q. So that it is the general practice among your roads and the other roads which you are familiar with that the men going on these tracks must either keep out from between the cars or protect themselves in going in there?

A. Our rules say that they must not expose themselves to unusual danger; that is the rule and we expect they will live up to it.

We make no provision in the slightest degree for the protection of the men on classification tracks so far as the cars coming down from the hump is concerned.

294 CROSS EXAMINATION by Mr. Dille:

I have been yard conductor or road conductor prior to becoming yard master about 18 years. I have been yard master about 12 years. My first service reaches back beyond the period of the adoption of the gravity switching in this general territory. The first gravity yards constructed in

Buffalo I think was ours, the road I represent, between 3 or 4 years ago. Besides those of the Erie and Pennsylvania none others that I am acquainted with have been constructed or installed and in use during or prior to that time. The only gravity yards that I am aware of in Buffalo territory are the yards of the Erie and Pennsylvania railroads.

Q. Have you ever visited any of the gravity yards in other parts of the country?

A. Well, I have in Hornell, N. Y. 296

I could not say positively how high the hump is there, but I should imagine eight or nine feet.

Q. Have you ever visited this type of yards in other parts of the country than what you mentioned?

A. No, sir, never have.

Q. Then your observations have been confined to that system of switching here in the Erie yards, the system here in the Pennsylvania yards and at Hornell, New York?

A. Yes, sir.

Q. For how long a period of time have you 297
observed such switching in the Pennsylvania yards here and the yards at Hornell, New York?

Mr. Adams: He didn't say he observed it in the Pennsylvania.

A. I didn't know that I said that. I said that they had a gravity yard in operation,—I visited it only once, that is all.

298 *Charles King for Deft., Cross.*

Q. In your yard over which you have jurisdiction,—do we understand that you send cuts of cars down from the hump down onto the distribution or classification tracks,—for instance on those tracks where a train is fully made up,—so that they will come in contact with that train, or do you send them down on that track leaving a clear space between the train already made up and the cars which you drop?

A. No, sir, we do not.

Q. Then do we understand that you let them
299 come down and couple on?

A. They are all impacted.

Q. They are all coupled on?

A. Yes, sir.

Q. Then the yard crew that desires to pull a train out of the yard, or the road crew has to go along and make the classification themselves of all the cars they want coupled to the engine?

A. The cars are classified,—he simply cuts off the number that he wants; if he wants 35 he takes 35,—if he wants 40 he takes 40.

Our classification yard tracks run from 60 to
300 90 cars in length. It is a continuous operation with our road in switching cars from the hump, which automatically couple onto the other cars, night and day.

Q. It is a fact, is it not, that the railroad switching crews and road crews in preparing to take out trains have to examine the coupling apparatus, air hose, etc., to see there is nothing

dragging or under the brake beams or anything of that sort?

A. Yes, sir.

That has always been the custom. It has always been the duty of either the yard brakeman or the road brakeman or the yard conductor or the road conductor before pulling out to look them over. If they are in the road service, they must also check up the numbers and see if they have the proper cars. Our yard men don't have to do that.

Q. The only way that the trainmen in looking 302
over the trains to see whether or not the cars are coupled together and in shape to be pulled out, when he finds something dragging like an air hose or some little irregularity or defect about the drawbars or the brakebeam, is to step in between the cars and get hold of it and adjust it,—he cannot do it from the outside?

A. He does it at his peril.

Q. That is the only way he could do it?

A. If he could not get anybody else to do it for him.

Q. That is the only way it could be done? 303

A. It is, yes, sir.

Q. He could not do it with a long pair of tongs or anything of that sort?

A. No, sir.

Q. Are you familiar with the particular method of switching cars in the Pennsylvania classification yards?

A. I have seen them but of course—I went out

304 *Charles King for Deft., Cross.*

to their Ebenezer yard and looked around and saw their method of doing business but I didn't stay very long. I took a glance at it.

Q. Do you have fast freight trains that you make there on these tracks and then switch your promiscuous freight right in on to those trains—?

A. Of course if we are making fast freight we would not put—

By the Court:

305 Q. What do you do when there is a string of cars on the hump—run another string of cars right down in there?

A. We do if there is any room; those cars are continually put in from one track on probably ten or twelve—there is no particular tracks—and the fellows as a rule take them out from the opposite end and distribute them to the Pennsylvania railroad or to any other railroad.

The Court: Find out what he would do in a case of this sort.

306 By Mr. Dille:

Q. If a train of fast freight is standing on this track—indicating the classification yards of the Pennsylvania railroad—this representing the hump and these the leads and the tracks numbered consecutively Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9 and the forward end of the train of fast freight number

307

94 is all made up and standing on track 4; the rear four cars of that train are detached from the other part of the train, and the proof is that it was because the coupler on one of the cars was detached,—is it your practice where the rear end of these cars are within considerably less than 500 feet of the top of the hump, to send another cut of five cars right down onto those cars there?

(Counsel indicates on map.)

308

A. Yes, sir.

That is our practice. I consider that good railroading.

Q. How difficult is it to make these impact couplings—have they got to be hit hard or just reasonably light impact?

A. A good many of them must be hit hard.

We send those cars down with riders. We send them down onto the train with the cars pretty well under control, so that they will not strike hard enough on the cars below to do any damage.

309

By Mr. Adams:

Q. You say not hard enough to do any damage —damage to what?

A. To the equipement.

In determining the force of the impact we provide against damage to cars or the freight inside.

310 *Charles King for Deft., Cross.*

By Mr. Dille:

It is our practice to send them down regardless of the position the men are in, putting them under obligation to take care of themselves.

Mr. Adams: As I understand it, it is stipulated here that there is no claim of negligence on account of improper construction of this yard, or on account of having a gravity yard.

311 Mr. Dille: We admit the Pennsylvania company or any other railroad has a perfect right to construct, operate and maintain a gravity yard; I wont hesitate to admit that they could maintain one even if they would construct a lead from the hump 25 feet high instead of 7 or 8 or 10 feet; they simply construct, operate and maintain a yard of that kind under their obligation to the degree of care they are to take for their employes, and so forth; but as a matter of real right I do not think there is any question but they have a perfect right from an
312 engineering standpoint or a practical standpoint, but they must keep their equipment in proper condition accordingly and so construct their tracks as to preserve the safety of their employes accordingly—

Mr. Adams: I can call a witness here or two to show the construction of the gravity yards,—that is, that it is proper

construction, if there is any claim that there was not.

The Court: There is no evidence indicating that it was not properly constructed; no evidence to show that the railroad company did not have the right to use the gravity yard; I understand it was conceded that those things are done and no negligence or claim of negligence predicated by reason of its maintenance by the defendant.

314

JOSEPH C. CHAPPELL, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I am the paymaster of the Pennsylvania railroad. Boldt entered the employ of the railroad in 1901. He was continuously employed from that time on. As switchman—throwing switches, yard brakeman and yard conductor. At the time of his death, in 1911, he had been yard conductor 3 or 4 years. Before that he had been yard brakeman. His average salary ran about—for last year previous to his death about $92 or $93. 315

The Court: Per month?

Yes, per month. Here are the figures. (Witness produces paper.) I took these figures from the payrolls. Average for the year prior to his death was $92.33.

316 *F. M. Ashmeade for Deft., Direct.*

FRANK M. ASHMEADE, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I am a civil engineer in the service of the Pennsylvania railroad. I was formerly division superintendent. I am now connected with the general superintendent's office here.

Q. You may tell us if you know the elevation of the hump in the Bailey Avenue gravity yard
317 of the Pennsylvania railroad?

A. The crown of the hump is about seven feet above normal or general level of the yard.

I have made something of a study of the construction of railroad yards, and am familiar with the general use of gravity yards by other railroads. From my recollection they have been in use about 16 years; previous to that they may have been in use but I was not familiar with them. I am familiar with the gravity yards of other railroads.

318 Q. Generally speaking how does the elevation of the hump in the Pennsylvania yard compare with those at other places?

A. At Babcock Street the hump is rather lower, slightly.

That is caused by the overhead crossing and there is not so much rise as we would like. There is a viaduct overhead there.

Q. How high do they run—what is the highest one that you know of?

A. About 20 feet sometimes.

CALVIN E. TEELING, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I live in Buffalo, and am employed as a yard conductor for the Pennsylvania railroad. Have been a yard conductor for that company for about 3 years. Before that I had been a yard brakeman for about a year. I have worked about four years in all. Before that I worked on the Lake Shore, the Erie and also the Delaware. I have been a railroad man for the last 22 years. I was the yard conductor attached to this hump engine the night that Edward Boldt was killed. I remember the accident. 320

By the Court:

Q. The decedent was also a yard conductor? 321

A. Yes, sir.

I was the conductor in charge of the engine on the hump. We were engaged in classifying cars, letting them run down onto the classification tracks. Mr. Boldt was the conductor attached to the yard crew that was going to make up the other freight train, number 94. I had known Boldt ever

since I went to work for the Pennsylvania. He worked about that yard all that time practically. Just prior to the time that this cut of cars was laid down onto track 4 I pulled them off from track 5, emptied track 5. Pulled them up to the top of the hump to classify.

Q. Just tell us where you let go of them?

A. I went in on track 5 with the engine and pulled back with six cars. I signalled the switchman "track 4"—I hollered it to him.

323 Q By switchman you mean the fellow at this switch?

A. Yes, sir,—the cuts go in where I tell him to.

By the Court:

Q. That was from the top of the hump?

A. Yes, sir. After I tell him what to do and give him the number of the track—track 4, he threw the iron—

He threw the switch. The switch levers and switch lights are indicated by these little crosses alongside of the track here on this map. I saw him throw the switch.

324 Q. What did you do then?

A. I gave the engineer the slow signal to come ahead and when he came ahead I stopped him again and held the six cars there; then I gave him another slow signal to keep the slack of the pin on the lever and cut the cars off and swung them up at the same time and the cars drifted off the hump with the rider on it.

The rider was Frank Bull. I let five cars go down. By the rider I mean the brakeman on top. He was located on the first car that we called the head car, the south end car. He had a light. The cars were not kicked in any way from the top of the hump. I saw them all the way down. They were going slow,—he had them checked up. I saw them strike the other cars.

By the Court:

Q. Where were you? 326

A. Standing right on the hump after I cut the cars off.

By Mr. Adams:

Q. You mean up near the scale house?

A. Yes, sir.

Q. Here is the scale house—?

A. I was right in between here—about here.

(Witness indicates on map.)

Q. You stood about opposite the middle of the yard master's office? 327

A. Yes, sir, because I put the engine down—when I swung the engine ahead and brought her in there and stopped her and cut the cars off—after I got the slack the second time.

When the switch is opened for the purpose of letting a string of cars go in on to the switch track the light shows green towards the north.

328 *C. E. Teeling for Deft., Direct.*

Q. And on the opposite side—to the south it would show green?

A. White.

Q. On the opposite side?

A. Yes, sir, green; if it is set for the leader the switches are all white.

If I looked over there and saw a straight line of white lights that would mean that the car would go all the way through. If one of them was green it would mean that the car would turn off and
329 go on to the track. I saw before the cars started from the top of the hump that one green light at track 4. That was in accordance with my directions.

By the Court:

Q. What was the duty of the rider?

A. What we call riders or brakemen—they are kept on all cuts—on the cars to take them down for safety in not breaking the cars; when you call off these cuts to the switch tender and he lets these cars in on those tracks these riders—yard
330 brakemen—get on these cars and ride down with them,—shut the brakes and take them down gradually, down the hump.

Q. They are not supposed to run into the cars already stationed on the track?

A. Yes, sir, he had a perfect right as long as they were live tracks; the only time I didn't have a right to run into them is when the train is made up and turned over to the inspector and

there is a blue light put on it and a lock put on each end and we can't get in on that track until that train is pulled out of there and then that track is turned over to us.

Q. I understand that those cars that you sent down were intended to form a part of the train that was there on track 4 in the process of making up?

A. No, sir, those cars that I sent over was for the sole purpose of classifying those five cars which I called B F 2 station, making up 308 train; I had what is called 5 P F W & C, that goes by 332 way of the Fort Wayne railroad and we are classifying them that way and the next car next to the engine that I hauled onto the track was P C C that goes by the way of P. C. & St. M.—

Q. In other words you must run cars in on these tracks and sort them out to get their right place in the train?

A. Yes, sir.

Q. Didn't you know that that train was being made up there 500 feet away?

A. No, sir, I didn't know it; I put these cars in there myself with the intention that if this 333 engine number 6203 at the other end—we took those cars and we doubled them on train 94 from track 2; I had a perfect right to use that track because there was no light or protection against me from using that track,—it was a live track and it was not turned over to anybody and it was to classify those cars on.

334 *C. E. Teeling for Deft., Direct.*

By Mr. Adams:

As long as there was space on that track I could use it.

By the Court:

Q. If there had been a light or a signal of any sort to the effect that the train was not made up where would the light be?

A. If I had seen a light of any sort or a signal light of any sort there I would have known there
335 was somebody working there, but there was no light—they were out of my view—I could not see any.

By Mr. Adams:

They would use a blue light if the men wanted me to stop classifying on any track. They would put up a blue lamp. They would also put a lock on the switch so that you could not get in there and throw the switch.

By the Court:

336 Q. Could not you see the engine from where you were?

A. No, sir; they had hold of a string of cars and they were going to back up those cars there and double them over and they couple to the train of second 94.

By Mr. Adams:

There was no necessity of my looking or notic-

ing, we don't take any notice of anything of that kind; we have a right to classify the cars as long as they are live tracks.

By the Court:

Q. Still you say if you saw a light there that would indicate that the men were working there you would not send the cars down?

A. I could signal them to get out of the way?

Q. But you would send the cars down anyway?

A. I sent them down because I didn't see anybody there. 338

Q. But you would send the cars down anyway even though you had seen the light, although you would signal them that they were coming?

A. Yes, sir, I would warn them that they were to get out of there that the cars were coming in there.

By Mr. Adams:

Q. But you never made a practice to signal anybody?

A. No, sir, never.

339

Under the procedure in use there I let the cars go down on those live tracks at any time, unless there is a blue light or a locked switch. That practice has been in use all the time that I have been there.

Q. What were your instructions in making up trains in the yards in regard to protecting yourself,—assuming that you were down where Boldt

340 *C. E. Teeling for Deft., Cross.*

was what rule had you been instructed to follow?

A. The rules are to protect yourself in case you are going in there to adjust a coupler in there or anything, to send a man up and notify them not to put cars on those tracks.

It is generally understood at all times in the yard that the men must look out for cars that are coming down the hump.

CROSS EXAMINATION by Mr. Dille:

341 Q. I didn't just get whether or not you said you were standing out about the crown of the hump doing the cutting?

A. Yes, sir, about there, at the crown of the hump—about halfway in the center of the hump. (Witness indicates on map).

Where that little chalk mark is there, opposite the yardmaster's shanty.

Q. Did I understand you to say that when you cut off this cut of five cars they run down on track 4 and bumped into the 94's cars or a part of them—you didn't see the 94s train standing in there.

342

A. I didn't see them—I said I had put those four cars in there previously and came back with another string of cars and coupled on them and took them over—I saw them there. I saw those 4 cars there. I didn't know that 94 train was all made up; I am not making up trains; I was making up 308 train. These five cars that I sent

in there were for number 308 train. I could see the four cars that I sent in there before that distinctly before I cut off. I saw those five cars that I sent in there last just before Boldt was killed going down there and I saw them strike too. I watched them all the way down from the time I cut them off until they cleared the lead so that I could kick the other cars towards number 10. I could not say how much clearance was there of the lead switch before they struck. These cars were, I should judge, from drawhead to drawhead, one end to the other, about 40 feet, 38, 39 or 40 344 feet.

Q. What is your judgment regarding the distance from the crown of the hump where you were standing to where Mr. Boldt was killed if you know where he was killed?

A. I could not say, I should judge about 500 feet.

I sent a rider down on that cut of five cars. I watched him.

Q. After those cars cleared that lead switch?

A. Did I watch him?

345

Q. Yes, sir?

A. No, sir, I saw him—they always check up their cars when they get on the car—I always tell each brakeman "there are so many cars in this cut—you have five cars" and he knows how to handle the five cars; he knows that he must go after the first brake and set it before it leaves the hump and as they gradually go down he checks them up.

346 *C. E. Teeling for Deft., Cross.*

Q. He keeps working from the leading end—from the brake on the leading car to the brake on the next car and on a cut of five cars he would be operating back, car after car setting the brakes until he got to where they struck?

A. Yes, sir, off the hump—with the grade of that hump—they take five cars down with one brake.

Q. It all depends on how good the brake is?

A. Yes, sir, it all depends on how good the brake is.

347 Q. Some of them will take hold quickly and some of them moderately and some are practically no good?

A. Yes, sir.

Q. You don't know anything about how the brakes operated on this cut?

A. No, sir, I could not say.

They struck the other cars but they didn't strike very hard. I did not know that an accident had happened until we received the signal from the inspector. It didn't seem over ten seconds after that. I didn't know that Boldt and
348 his crew were making up number 94. I didn't know that assistant yardmaster Murphy was in there.

Q. The lights of which you spoke in replying to his Honor's question and also Mr. Adams' were the lanterns the brakemen carry,—if you had seen Mr. Boldt's light or Murphy's light in there you

would have taken some precaution, is that what I understood?

A. I certainly would signal to those people to keep out of there that I was going to put a cut of cars in there if I saw them but I didn't see any lights.

I didn't see any lights moving about. I didn't know that this cut of four cars that was sent in there for 94 and hit the others had not coupled up with the rest of the train. Those four cars were the only four cars on that track when I cut 350
them in there—the track was clear outside of that.

Q. The other cars in 94 were shoved in from the other end?

A. Yes, sir, from the south end.

Q. Wasn't it customary in sending cars in there—where there is a train made up—for the rider to stop the cut of cars a little short of hitting the train that all made up?

A. That train wasn't all made up.

Q. The forward part of it—all the train on track 4 was made up—you merely had to pull 351
over there?

A. Train is never completed until it is turned over to the road man.

Q. What I wish to get at is this, I don't want to tangle you—was it the practice in this yard to send cars down like you described and let them couple onto the other cars promiscuously or was it the practice to leave an open space between the

352 *C. E. Teeling for Deft., Cross.*

cars so that when the crews came in there and took the train that was made up they would not have to go and look at the numbers and check up the numbers and go through that delay of cutting the wrong cars out, was that the practice?

A. I will tell you the practice—when a track was open like that track there I had a perfect right to kick as many cars in there as I wanted to— if necessary to fill that track.

By the Court:

353 Q. Was it your intention to couple those cars that you sent in there with the other cars that were stationed there?

A. It didn't matter whether they coupled or not; there was nothing to show me that I didn't have any right to put them in there.

Q. All you wanted to do was to send then in there?

A. Yes, sir.

Q. It didn't matter whether they were coupled up with the cars that were stationed there or not?

A. Yes, sir, I had the perfect right to do it.

354 By Mr. Dille:

Q. You sent these cars down merely cautioning the riders not to let them hit hard enough to damage the property?

A. Yes, sir, that is all that is necessary as long as they don't smash the cars.

Q. That was all that was considered. And the

yard men and the trainmen in there must look out for themselves?

A. Yes, sir, they must as long as I am putting cars in there because they know that thing themselves.

By the Court:

Q. You say that you heard of this accident ten seconds after you sent the cars in there?

A. I didn't hear it—I saw the signal from the car inspector, they have a big bulls eye and when he swung that lantern I got the signal; he came to me and he said "Don't put any more cars in 356 there—don't move those cars." I said, "What's the matter?" He said, "There are two men in there and I think they are both killed." I said "Who are they?" He said, "Two switchmen."

Q. You said it was ten seconds; do you think it was about ten seconds—or almost directly after?

A. After they were hit—when I saw that lantern swung up I stood there with the engine and one car.

Q. About how long did it take to run those cars down from the hump to where this accident 357 occurred?

A. I could not exactly say.

Q. I didn't ask you exactly, what is your judgment?

A. According to how the rider drops them in there—he may drop them in there gradually.

Q. He was there and expected to manipulate the brake?

358 *C. E. Teeling for Deft., Cross.*

A. He was there and expected to manipulate the brake and to set the brake gradually and drop them in there.

By Mr. Dille:

I don't remember now anything about how much he checked these cars up. As soon as the hind end of that cut cleared the switch, it is customary for me to send another cut on some other track. I just move them enough so that they can be uncoupled; keep slack enough to leave the latches
359 open up.

By the Court:

Q. You testified if you had seen a lantern or signal in there that you would have delayed sending these cars in there,—or would have given them a signal?

A. I would have hollered to have those men get out of there that there was some cars coming in and that would signify that they were coming in and this would not happen.

360 There is no rule that requires me to look for a signal under those circumstances. Not when there is another train being made up. Always at night time it is my personal practice to look out for signals and lights, if I don't see anything.

By Mr. Dille:

The rule calls for the yard conductors pulling out trains and the road conductors also before

they start pulling out a train to look them over and see that the couplings, air brakes and equipment is in proper shape and safe condition to move. That has been the custom as long as I have railroaded; in all other railroad yards or every railroad that I worked on; all my 22 or 23 years experience. As an expert railroad man I know where a train is being prepared to take out that where they couple on with the engine to move to another track they must know that cars are all together, and all in condition to move.

362

Q. And that they are very likely, just preparatory to taking out a train like that,—the conductor or brakeman looking them over—to step in there and adjust the hose or step in there quickly to adjust something else that they may see is not in condition before the train is pulled out?

A. It is not customary on the Pennsylvania to do that; they have men—when the trains are made up they are turned over to the air men and inspector for inspection; when a blue light,—or a blue flag in the daytime,—the ins[illegible] or unlocks the switch and lets the engine in [illegible]ce and they couple on the train is ready to go and they don't 363 have to look the train over because it has been looked over by the inspector.

Q. The air inspector makes the final test of the air?

A. Yes, sir, the air inspector makes the final test of the air and also the repairs and the inspector going along there,—if there is a crippled car in the train,—after we make them up there

364 *C. E. Teeling for Deft., Cross.*

and we must go in there,—after they take the light off we go in and take out the crippled cars.

That is after the whole train is made up and tied together, with the caboose ready to go on, and the road engine coupled on or ready to couple on.

Q. Where the yardmaster or the yard brakeman looking over a train preparatory to taking it out finds a coupling that didn't make by impact, what does he do generally, look to see why it don't
365 make?

A. Yes, sir; if necessary he tries to make the coupling and if not he goes, we have car repairers for that purpose and he could have them come up and fix and adjust the coupling so that they will move.

Q. You don't understand the question; you are anticipating something more. When a coupling doesn't make by impact do you stop and send for a car repairer?

A. No, sir, you try to see if there is anything the matter with it.

366 Q. You see if it does not work simply because it is dirty or rusty,—?

By the Court:

Q. In order to try it you must step in between the cars?

A. No, sir, you can stand outside, you don't go inside.

By Mr. Dille:

Q. They cannot look at a coupling inside unless they go inside?

A. No, sir, they must look at the coupling to see if anything is the matter with it.

Q. The coupling is in the center of the car and if there is something wrong with the knuckle or inside of the knuckle or something wrong with the latch pin they could not see that standing outside, they must step in and look and with some of these automatic couplers they must step in and open the 368
knuckle by hand instead of by this lever outside of the car, isn't that a fact?

A. Yes, sir, some of them.

It is the custom and the duty of the brakemen or switchmen,—when an impact coupler doesn't make,—to look at it to see if he can tell why it doesn't make before he sends for the car repairer or the inspector.

Q. It would be considered foolish for every little trifling thing like that to stop and send for the car repairer?

A. If those cars don't couple there is something 369
the matter with the knuckle or the lugs and we are not supposed to repair them.

Q. You are not supposed to but you often do, don't you?

A. At that time of night when you are making up fast freight you don't have time to stop and monkey around with those couplers.

370 *C. E. Teeling for Deft., Cross.*

Q. But you can get a knuckle handy and all that you have to do is to pull the pin out and take the broken knuckle out and put the new one in,—that is a simple operation?

A. Yes, sir.

By Mr. Adams: I object to this examination; it is not a question of putting new knuckles in or making repairs.

The Court: It is a question of whether these men under present conditions were
371 justified in going in between the cars. Objection overruled.

If I discovered the knuckle was only partially worn and that by just manipulating it a little that I could make a coupling by opening the other knuckle I would do that and draw it out on another track,—on the repair track. That is customary for the trainmen or the yard men, and has been ever since we have used the automatic couplers. It is a fact that we don't send for the repair man unless we feel that we have to.

372 Q. And the yard conductor or the yard brakeman can do that as well as anybody else and does do it under such circumstances, don't they?

A. Yes, sir, but it is not their duty; when you come to putting in knuckles—

Q. They do it as a matter of fact?

A. They do it on their own responsibility.

By the Court:

Q. They must see, under rule 707, that the brakes are in order before starting?

A. Yes, sir, but they are not supposed to put in knuckles or take them out.

By Mr. Dille:

They could not tell whether or not it is necessary to put in a new knuckle unless they make an examination; they must examine the knuckle before they can put in another one. 374

Q. If the lug of the knuckle only was broken,—the part that you swing in behind the latch pin—they could not tell that for a certainty unless they stepped in and looked at it could they—they could not tell that for a certainty?

A. They would know there was something the matter with it. But they could not tell just how it was broken, unless they looked at it.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. When it becomes necessary,—you testified that you sometimes go in and examine the couplers 375 or make slight repairs,—do you make any provision for protecting yourself when you do that—do you go in there without knowing whether or not there are cars coming on the track?

A. You must protect yourself—if you go in there you take your own chances.

376 *C. E. Teeling for Deft., Re-direct.*

By the Court:

Q. What do you have to do?

A. You send a man up and notify them not to put anything on that track until you get the coupler fixed.

By Mr. Adams:

Q. Suppose you came up there and had two men or had somebody else with you and you went in there what would you do?

377 A. Send one of them up and tell them not to put anything in there.

Q. Supposing there was a man you could post outside to watch would you do that?

A. Watch for them coming in there?

Q. Yes?

A. Yes, sir,—so as to holler out to those men to look out that there was a cut coming in.

Q. You say that the company furnished car inspectors for the purpose of making repairs such as you described,—putting in new knuckles, etc?

A. Yes, sir.

Q. Isn't it a fact that those men are called
378 upon to put in new knuckles when necessary?

A. Yes, sir.

Q. And those men lock the switches when they operate?

A. Yes, sir.

Q. And put up a blue light?

A. Yes, sir.

Yes, I said if I had seen any light down there

while I was working on the hump I would have hollered to these men. I meant that if I knew there were men in there in danger I would have told them to get out of there. I don't make a practice in any way of looking down the string for men. In switching cars there I observe the tracks for blue lights, and if a blue light shows up I would know there was a car inspector there, because we could not get in there. It was customary for me to have signals passing between the yard crews and myself working on the hump; signals to come ahead or go back. 380

Q. I mean those men working on the tracks in the classification yards,—when you were dropping cars down in there.

A. No, sir, no signal, only when we got the train made up or coupled up to shove it off.

It was the car inspector that swung me up after the accident; I could tell that from his light; he had a different kind of light. He knew that somebody was hurt and swung me up. He was right close to where the accident happened, between tracks 4 and 5.

381

Q. In examining the air brakes and along underneath the train it is not necessary to get under there to see if there is anything the matter—you can swing your lantern under the train and see if there is anything down?

A. Yes, sir, you can see if there is anything down.

382 *C. E. Teeling for Deft., Re-direct.*

The train air brakes and other equipment is inspected by the air brake inspector before the train goes out, so that there is no duty on the part of the yard conductor to make any inspection. When a train is made up on the classification tracks I send other cars in there and don't pay any attention to the fact that the cars may couple. When a crew goes in there they uncouple—if they are going to pick up cars on one track and double on them—they take up as may cars as they want and double over there.

383 Q. Do you know whether or not the rider on the string that went down there at the time Boldt was killed had the brakes set before he started?

A. I saw him going at the brake; I don't know whether it was set or not—I saw him twisting up on it.

Q. This rule 707 applies to road conductors, does it not?

A. Yes, sir.

Mr. Dille: The rule speaks for itself.

384 The Court: Ordinarily but it may be a little helpful to have him describe it.

A. It says freight conductors.

By Mr. Adams:

The yard conductor carries the way-bill, when he is coming from one connection to the other where he is delivering cars. He has train orders

only when he goes out on the road—on the main line—on the main track—so that he knows just what to do. In running cars down on these classification tracks the precaution taken is not to damage the cars or the freight. This has been the practice ever since I have worked there.

RE-CROSS EXAMINATION by Mr. Dille:

Q. You make a distinction do you not between an inspection of couplers and air brakes and just a glance to see that they are in apparent order; 386 you don't classify that as an inspection, do you,—as you walk along—as the conductor or trainman walks along there and takes a glance, you don't classify that as an inspection do you?

A. He walks along and sticks his light out to see if the hose is coupled and see if there is any brake rigging down.

Q. You mean that where you swing the light in between that is an inspection—way in between?

A. Yes, sir.

Q. But just walking along and making a casual observation you don't classify as an inspection, do 387 you—just a glance to see if they are coupled, do you?

A. We go along to see if there is any parts hanging out or any obstruction that is going to be in the way; those cars—the trains are all inspected after they are made up. That is the final inspection before they are sent out on the road.

Q. You don't know whether the conductor mak-

ing up 94 would have the bills so that he could tell whether he got on the right cars or not or—?

A. The yardmaster tends to that part of it. Mr. Murphy as assistant yard master there that night probably would have the bills there and know which cars were which.

By Mr. Adams:

At the time these cars ran down I could see the north end of the string of four that stood on that track.

389

ELMER P. GERHARD, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I am an engineman employed by the Pennsylvania, and have been since 1907. I was in charge of this hump engine the night that Edward Boldt was killed. I remember going down onto track 5 and pulling out a string of cars just before that.

390 I took them up over the hump. When I received the signal to slack up, I stopped and slacked up.

Q. What I mean by slacking up—that you stopped that part of the slack in against the cars?

A. Yes, sir. On signal from the conductor. I didn't kick those cars at all.

WILLIAM C. LINDNER, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I am foreman, car inspectors, employed by the Pennsylvania Railroad. Have been so employed for two years. I live in Buffalo. I examined this car that ran over Boldt. It was 107700 New York Central. I was asked to inspect. I found a broken knuckle. The car came from the New York Central on October 6th. 392

Q. Where had it been?

A. It was destined to local delivery track in what we term the Fillmore Avenue yard and it was reloaded and taken out in the classification yard for moving south.

Q. Was it coupled up with the other cars at this time?

A. It was received in a string of twenty odd cars from the New York Central.

All the time prior to the accident it had been in the possession of the Pennsylvania. I have examined the records on that subject. It was received from the New York Central on the designated track, what we term yard number one, on the 6th of October. The break I found in this coupler was part new and part old; there was a flaw in it; flaw in the iron of the lug of the knuckle. It was a new coupler and new drawhead. 393

394 *W. C. Lindner for Deft., Cross.*

CROSS EXAMINATION by Mr. Dille:

I could not say exactly how much of an old flaw there was, but I should say from a quarter, three-eights or half inch, the whole thickness of the lug was approximately three or three and a quarter inches.

Q. Do you remember whether or not that coupler was in condition so that it would partially hold with another coupler connected into it?

395 A. There is no question but it would hold—it had held when it came in there.

I don't know how long it might have been in that weakened condition, but it had laid in the yards of the Pennsylvania Railroad from the 6th to the 11th of October, the date the accident occurred. It was switched in to what we term the local delivery track at Fillmore Avenue and unloaded and was reloaded and consigned for movement south. I can't say anything about how many movements of switching that car had gone through. It is rather a simple operation to remove and replace a new knuckle in one of these

396 couplers. It is accomplished by taking out the pin and taking out the knuckle and putting in a new knuckle.

By Mr. Adams:

Q. Could this break be discovered with the cars coupled?

A. No, sir, it could not.

Mr. Dille: I object to that as immaterial.

Objection overruled.

Exception.

JOHN GLEASON, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

398

I am a car inspector employed by the Pennsylvania. I made an inspection of New York Central car 107700, on October 6th, at Fillmore Avenue yards, on track 6. I did not find any defects. I went all over it. At that time it was coupled on other cars.

CROSS EXAMINATION by Mr. Dille:

I made my inspection October 6th, when it arrived in the Pennsylvania yard. When I made my inspection it was coupled onto the other car. It was coupled on so that I could not see the inside of the coupling.

399

By Mr. Adams:

The couplings were working all right.

400 *C. J. Hohl for Deft., Direct.*

CHARLES J. HOHL, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

I am a car inspector employed by the Pennsylvania Railroad. Was so employed on the night Edward Boldt was killed. On that night I was general car inspector in the Bailey Avenue yard. What first attracted my attention to the accident was somebody crying for help—I heard somebody
401 holler for help. I didn't see the accident happen. When I heard the cry for help I crossed over the two strings and swung them off, that is stopped them so that they would not move. I signalled the conductor on the hump and the one on the other end. I was working on that yard at that time as inspector. I am familiar with this rule 180. There are times when I had to go between cars to make repairs. It was my custom to place a blue light on the train and lock the switch. That is our rule, the rule for the car inspector.

By the Court:

402 Q. When repairing or inspecting?
A. When repairing and inspecting.

By Mr. Adams:

On the classification tracks I never went between cars for any purpose without putting up a blue light and locking the switch. I am provided with special keys. The man on the head end also had

C. J. Hohl for Deft., Cross.
Frank Bull for Deft., Direct. 403

a key. There is a car inspector on the head end of the train. Always work together. We two men have keys which are the only keys that will unlock a certain lock that we use on these classification tracks, so that when we went in between cars we locked the switches with these special keys, and we were the only men that could unlock them.

CROSS EXAMINATION by Mr. Dille:

404

My work was chiefly work of air brake inspecting. I would not make any inspection of the air, couple it up or test it, when they were switching cars in on or off of tracks. It was the common custom that the air brake inspectors would generally have a track and train all to themselves to do that work. I had no control over the yard men, no connection with them.

FRANK BULL, a witness sworn for the defendant, testified as follows: 405

DIRECT EXAMINATION by Mr. Adams:

I am a switchman employed by the Pennsylvania Railroad. On the night of October 11th. I was working on the Buffalo hump. I was the man that rode down with this string of five cars. Before I left the hump I tested the brake to see if it

406 *Frank Bull for Deft., Cross.*

worked all right. I tested the brake and Conductor Teeling shoved the cars down a ways and then cut them off,—after he stopped them he cut the slack and cut off the cars and I took them down; they went about four miles an hour I should judge, off that hump. I gradually slackened up, using the brake—both brakes. One on the north end of one and the other the south end of the second cars, that is the two brakes that were together. The cars ran in against this string that stood on that track. There were no cars on track
407 5 at that time that I could see. I didn't see anything of these men on the cars, in between the cars, I didn't expect them to be there.

CROSS EXAMINATION by Mr. Dille:

I checked the speed of the cars to about four miles per hour and they coupled onto the other four cars. I had set one brake on the leading car; I had that set all the time. I also set the brake on the second car. The brakes were in good working order. I set the first brake on the leading car just as I was leaving the hump, before the cars
408 were cut off. Then I set the next brake while I was running down.

Q. Do you remember about how many seconds—your best judgment without attempting to be accurate—it was from the time that Mr. Teeling cut off that cut until you bumped in the four cars—was it ten or twenty or thirty seconds?

A. I think between two and three minutes.

Q. You think between two and three minutes?

A. About two minutes probably from the time it was cut off until I collided with the cars standing on number 4.

Q. About how long do you think it was from the time you crossed the track and got into the clear—that cut that you were taking down cleared the lead switch—about how many seconds from that time until you struck the 4 cars?

A. I don't know whether the cars cleared that lead switch or not.

Q. You were about the middle of the cut when 410
you hit?

A. I was on the second car. I had the second brake set then. I was not going to the third brake, I was standing on the brake stand. The brake stand on that second car was down on the platform below the end of the car. It was one of those platform brakes about two and a half or three feet below the roof of the car. I had my lantern on the leading car. It stayed there when we hit. It stayed there all the time. It was a Pennsylvania standard lantern. I was looking at the cars ahead of me when I was going down there. 411
I was standing at brake number 2 after I got it set so that I could get the jar off. That was all I intended to set. I thought four miles an hour was enough to check them. I was accustomed to riding these cuts of cars down in there so that they would go about fast enough not to smash the cars, and paid no attention to the employes working about the cars.

412 *Frank Bull for Deft., Re-direct.*
C. R. Colgrove for Deft., Direct.

RE-DIRECT EXAMINATION by Mr. Adams:

Q. You say that the train was going— I suppose your answer in regard to the speed was but an estimate of the speed?

A. No, sir, it is not an estimate—I estimated about four miles an hour. That was when I was going off the hump. I had one brake set then and then I put on the second brake.

Q. So that the train probably was going less
413 than four miles an hour at the time you struck?

A. It might have been. The brakes have a tendency to slow them up. At any rate I was going slow enough so that I thought it was only necessary to set the two brakes.

CHARLES R. COLGROVE, a witness sworn for the defendant, testified as follows:

DIRECT EXAMINATION by Mr. Adams:

414 I have been in the railroad business 27 years. At the time of this accident I was assistant trainmaster. I had charge of the operation in Buffalo territory. The Babcock Street yard came under my jurisdiction. The train crews worked under me, I had authority over them. This rule number 707 refers to road conductors. All the provisions in that rule are provisions necessary for the operation of freight trains on the road.

I am familiar with rule 180 in the timetable. Boldt's attention had been called to that rule. By me personally seven weeks before. I had given him oral instructions in regard to going between cars in that yard.

Q. What instructions did you give him and the other men in regard to going between cars in the yard?

A. I told him and the other men that under no consideration should they go between or underneath cars for the purpose of making any repairs 416
unless some member of the crew was there in a position to stop the train from being moved,—that is to notify the engine man, etc.

By the Court:

Q. What do you mean by that—stop what?

A. To have some member of the crew out in a position to stop the engineman from moving cars.

Q. There was no engineman on the cars that came from the rear?

A. To stop the enginemen from either end of the track from moving cars on the track or moving cars they were working on. 417

By Mr. Adams:

At the hump end of the track the cars are moved by gravity and started by gravity.

By the Court:

I mean the man who started the gravity movement on the opposite end.

418 *C. R. Colgrove for Deft., Direct.*

By Mr. Adams:

The instruction of these men was a particular part of my duty.

Q. How long had you been working in that yard with Boldt under you?

A. Yes, sir.

Q. Had that rule been in effect all that time?

A. Yes, sir, practically.

This practice of running cars in on the classification yards in the manner described here had
419 been in vogue ever since the yard had been in operation. There is no occasion nor is it contrary to instructions for the men working on the hump to drop cars into these switches. Those are always live tracks. Always used for the classification of cars. And it has always been the custom to run cars in on any vacant space or any track. I am familiar with the general practice used by other railroads. It is the general practice in all classification yards. Where the classification is done by steam power instead of gravity, the movement is practically the same, the cars are
420 shoved in by using a locomotive instead of using gravity. With gravity the classification can be done quicker and with less damage; it has been demonstrated to that effect. In gravity yards there may be five or six cuts drop in several tracks at the same time,—the hump conductor might make three or four cuts and cars might be moving in on various tracks at the same time.

Q. Is it easier to regulate the speed of the cars?

A. No, sir, it is not easier to regulate the speed of the cars; it is up to the judgment of the conductor himself how fast he would shunt the cars in.

CROSS EXAMINATION by Mr. Dille:

Q. This rule in question here, number 180, of which you speak of giving Mr. Boldt instructions covering,—I suppose you gave Mr. Boldt in company with a class of employes or a number of employes,—you had no occasion to call specific attention of Mr. Boldt to this rule any more than the rest of them, did you? 422

A. I had instructions from the superintendent to instruct all employes in regard to going between cars and under cars without proper protection from locomotives and work engines while in motion.

Q. That is jumping on them when they are coming towards them that way (shows)?

A. Yes.

Q. That rule pertains,—as it reads,—to the making of repairs or anything of that sort between cars? 423

A. Or coupling up air hose or any purpose when you have to go between cars.

Q. You don't mean to say that in all the years that you have railroaded that you could conduct a railroad by not stepping in between the cars on

424 *C. R. Colgrove for Deft., Cross.*

occasions to see why the coupler did not make or something of that sort, do you?

A. It is not necessary to step in between to see if the coupler is made.

Q. In the case before us here do you know of any way in all of your years in railroading that you could have told the condition the lug of that knuckle was in under the circumstances without stepping in there and looking into the face of it?

A. No, sir.

Q. In other words that was the only way it
425 could be done?

A. Yes, sir, that is the only way it could be done.

Q. And it was part of the man's duty in charge of that train—whether he was the yardmaster, trainmaster, brakeman or conductor,—when the coupling would not make, to find out if he could why it didn't make?

A. After first protecting himself.

Q. That would depend on how extensive an exposure he would have to make of himself?

A. The rule says he must protect himself be-
426 fore going between the end sills of the cars.

Q. That rule does not mean—that before you step between the end sills, you must go and flag the track at each end; you would not get anywhere?

A. It means what it says; that some member of the crew must be posted to protect them while going between the end sills of the cars.

Q. That is never done, is it?

A. Discipline has been applied when the rule has been violated.

Q. You have as brakeman and conductor on the road seen your assistants hundreds of times step in between the ends of cars for some little trifling temporary matter?

A. Not in my official capacity without applying discipline.

Q. They dodge you when they see you coming?

A. Possibly.

Q. They have done so in practice?

428

Mr. Adams: I object to what others have done behind the backs of their superiors.

Mr. Dille: They are trying to put this man practically in the position of a trespasser or suicide.

The Court: No, sir, they simply show that he didn't exercise ordinary care and failed to comply with the rule.

Q. It was customary was it not for the men on little trifling quick inspections—to step in there to see what was wrong? 429

A. It was the practice before that rule was put in force, and after the rule was put up we instructed the men if it was violated they must be disciplined for it.

Q. You don't know then to what extent, if any, it might have been violated?

A. We have applied discipline for that same offense.

430 Q. Isn't it a fact that you would never get yours cars switched or distributed if that rule was strictly lived up to?

A. It is a matter of fact that the Pennsylvania is willing to pay for the extra time consumed having that rule strictly complied with.

Q. But they have not to your knowledge made any extra provision as yet or had not at the time Mr. Boldt was killed?

A. We are still operating and getting out our trains in the ordinary manner.

431 Q. But it is with the same old custom of the men making those casual examinations as described?

A. I would not say it is; they are gradually breaking away from it; there is a new order goes in force every day on the railroad.

Q. Gradually breaking away?

A. Yes, sir.

Q. You said regarding the other rule that pertains to the road men only—rule 707—as a matter of fact there are parts of that rule 707 that pertain alike to yard and road conductors, is there

432 not?

A. Does it specify them?

Q. In other words, it is the yard conductor's duty to see that his cars and train are in proper shape to move—always has been and always will be?

A. No, not the yard—the car inspector.

Q. Do you mean to say that the yard conductor can come up and couple on to one car of

a train without looking to see if they are coupled and ready to pull off,—isn't it his duty as much as the road man to see that the cars are coupled together?

A. It is his duty to go and see if he can get the number of cars off a track that he is instructed to get.

Q. Is it not his duty also to see that they are coupled together?

A. Yes, sir.

Q. How could he get them out together?

A. He must see that they are coupled. 434

Q. Isn't that the same as the road man then—do you expect your yard conductor to go in the Pennsylvania yards and couple on to the trains in the yards and pull them out if they are not in condition—being coupled together—the air hose, brake beams and everything else—?

A. I don't know what you mean when you say "condition," the car inspectors—

Q. Forget your car inspectors; what are the duties of the man who has charge of the crew? If a dozen car inspectors had been around—he has to couple the engine under his charge on to the 435 train and pull out and he knows that the brakes and apparatus are in condition to move?

A. He would see that the cars were coupled together,—that was all that he would do in a yard train.

Q. Don't he have any duty to perform to see whethere or not they are in condition to move,—

436 *C. R. Colgrove for Deft., Cross.*

that there is no brake beams dragging or something?

A. If he discovered a brake beam down he would stop the train and have it removed.

Q. Would not he glance along to see whether the train was in condition or not to move or would he just go in haphazard way and couple on to the front end of the train and take his chances that the cars were all in condition to move?

A. If he had instructions from the assistant yard master to get a certain number of cars off
437 a track he would certainly walk alongside of the cars until he got to the rear car and would see whether it was coupled on or attached to the engine. There is no other rule in that book that specifically refers to yard conductors.

By the Court:

Q. Do you say it was not the duty of the yard master to go in and examine a coupling if they don't connect?

A. If they don't make he must first protect himself and then go between the cars and ex-
438 amine it.

By Mr. Adams:

Q. How would he protect himself?

A. Having men stationed outside to see if anybody was coming on that track or have a man notify the engine man. I mean stationed out in a manner similar to the way that Boldt was stand-

ing, practically the same. The duty of Murphy and Boldt on this night was simply to go in and pull that string of cars without reference to any inspection. That was what their duties required them to do. They had to go along and see they were coupled up and get out their cars; that was all.

DEFENDANT RESTS.

EVIDENCE CLOSED.

Mr. Adams: The defendant renews the 440
motion for a non-suit made at the close of the plaintiff's case and makes a motion for a direction of a verdict of no cause of action, on the grounds stated at that time, and on the further ground that it now affirmatively appears that there was no negligence on the part of the defendant that contributed to this accident, and that the sole and proximate cause of this man's death was his own negligence.

I desire also to add the ground that a case has not been made out under the Federal 441
Statute; contributory negligence being attributable to the deceased, he is not entitled to recover.

The Court: I think I will allow the case to go to the jury on the point that you have emphasized,—whether or not it was carelessness and negligence on the part of the

442 defendant railroad company to send these cars down over that "hump" in such a way as to impinge the cars that were stationed over 500 feet away; and whether, in the exercise of a proper degree of care, the defendant should not have instructed its employees, or promulgated a rule, that they should send them down in such a way so as not to come in contact with cars that might be stationed on the tracks.

You may go to the jury on that point to-morrow morning.

443 You have the exception, Mr. Adams.

COUNSEL SUM UP TO THE JURY.

Mr. Adams: I desire to have the stenographer note on the record that counsel in summing up has stated that several moments elapsed after Boldt stepped in behind this car, and argues his case on that point. I take exception to that statement.

The Court: The jurors will remember the evidence.

444 Mr. Adams: I object to the statement of counsel that there was a space of 20 to 30 feet between the cars; the testimony is that it was 20 feet.

The Court: My recollection is that it was 20 feet.

Mr. Dille: The testimony is 20 to 30 feet.

The Court: The jury will remember the testimony. 445

CHARGE TO JURY.

Gentlemen of the Jury:

This action was brought by the plaintiff, as administratrix of Edward J. Boldt, deceased, to recover damages claimed to have been sustained by reason of the carelessness and negligence of the defendant railway company while the decedent was in its employ on the 11th day of October, 1911; 446 the jurisdiction of this Court is invoked on account of the diversity of citizenship of the parties, the plaintiff being a citizen of the State of New York, and the defendant railway corporation a citizen of Pennsylvania, and concededly engaged in the transportation of freight from one state,—the State of New York,—into another state; the foundation for the action is the Employer's Liability Act, which was passed by Congress in the year 1908, and which substantially provides that if the employees of interstate railway carriers are injured while at work, on account of the negligence of the employer, or on account of the negligence of an officer or agent, or, indeed, even on account of the negligence of a fellow servant, that a recovery can be had. 447

It may be necessary for you to know that the Federal Employer's Liability Act has changed the rule of the common law applicable to negligence actions in an important particular; it might be

448 doubted,—indeed, I think it is the truth,—that, if this action were based upon a common law liability, there could be no recovery by the plaintiff; and there could be no recovery by the plaintiff because of the asserted negligence of a fellow servant of the railroad company,—assuming that is the sole ground of negligence that is contended in this action.

If this action were brought in the courts of the State of New York, even under the recent date statutory amendments to the common law, it is very doubtful whether there could be any recovery
449 by the plaintiff, if you gentlemen should be of the belief that the injury sustained by the decedent was, to any degree, attributable to his own carelessness,—to his own want of foresight and diligence; so that the Federal Employer's Liability Act is remedial in its nature, and bestows a benefit upon employees of interstate carriers such as was not secured to them by the common law; however that may be, gentlemen, I conceive it my duty to impress upon you at this time the fact that however beneficial are the provisions or protections of the interstate commerce law to which I direct
450 your attention, there can be no recovery in this case by the plaintiff unless you are satisfied by the evidence that the defendant was negligent, and that it was due, partially at least, to such negligence that the injuries were sustained; the entire gist of this action is the negligence of the defendant Railroad Company, and if the latter performed the full duty which the law places upon it,—a duty which it is required to discharge to its em-

ployees, there can be no recovery by the plaintiff, 451
however unfortunate was the death of the decedent. Negligence is not presumed or conjectured, nor can it be surmised or guessed at, but the burden of the proof is upon the plaintiff to establish to your satisfaction, and by a fair preponderance of the evidence, that the defendant committed a negligent act,—that it omitted to do something which the law requires it to do, and by reason thereof the injures were sustained. I do not mean to be understood as stating that the accident should have occurred solely on account of the negligence of the defendant, because, under the pro- 452
visions of the Act under which this action is brought, even though you should believe the decedent too was negligent, you may nevertheless, find a verdict in favor of the plaintiff, if the railroad company omitted to discharge a duty it owed to this decedent, its employee.

I am happy to say that the testimony in this case is not in dispute; there is practically no question of the truthfulness or untruthfulness of the testimony of the witnesses who have been produced either on the part of the plaintiff or on behalf of the defendant; you will not be troubled 453
with the question of harmonizing conflicting testimony, because, as I have stated, it is practically uncontroverted; nevertheless, two questions arise from this harmonious testimony,—one, as to whether the defendant was negligent, and the other whether the injures were sustained solely on account of negligence of the decedent; the burden of the proof, as I have

454 already stated, rests upon the plaintiff in respect to all the material allegations contained in the complaint,—in respect to the negligence of the defendant, and in respect to the damages; the burden of proof as to whether the decedent himself contributed to the injury to such an extent as to justify an apportionment of damages, rests upon the defendant, and the defendant must satisfy you by a fair preponderance of the evidence that there was contributory negligence by the decedent.

455 During the course of what I shall further have to say to you, I shall allude, frequently, I dare say, to the terms "negligence" and "ordinary care," and I think, that in order to apply the facts to the law, as is your duty, you should understand the meaning of those terms. The term "Negligence" has a legal significance, gentlemen, and means a breach of duty for which the actor or person at fault may be held liable; it is such omission by a reasonable person to use that degree of care which it was his duty to use for the protection of another from injury; while the term "Ordinary care" is defined to be such degree of
456 care, skill and diligence as men of ordinary prudence under similar circumstances usually employ.

The measure of duty with the defendant railroad company owed to the decedent, therefore, was "ordinary care"; the measure of duty which the decedent owed his employer was "ordinary care"; there was a reciprocal duty devolving upon each to use such care to the end that no accident

might occur; to the end that no injury might be 457
sustained.

Now, without endeavoring to narrate at length the facts to which your attention has already been directed, I need only to remind you that the claim of the plaintiff is that the defendant was negligent, in that the defendant's brakeman permitted that string of cars, five in number, to go along that gravity track under its own momentum, at such rate of speed as to come in contact with cars that were already standing on that identical track. Evidence has been given tending to show,—and that is not disputed,—that on the day in question, 458
between the hours of 8:00 and 9:00 o'clock at night, the assistant yard master, assisted by the decedent and others, was engaged in making up a train of freight cars, preparatory to transferring such cars and the freight therein contained, from this point to a point in another state, and while so engaged the assistant yard master perceived, after several trials, that a coupler was out of order, and that it did not readily perform the functions for which it was attached to the car, and while said car,—back of which there were five others, was separated and about 20 feet from the major por- 459
tion of the train,—the decedent, who had been at some other portion of the yard, came along, and the assistant yard master said to him that he thought there was something the matter with the knuckle of the coupler, and he inquired as to what the outlook was,—the particular words you will remember,—and it may fairly be presumed that the decedent understood by the remark that he

460 was to look up the track toward the "hump" and notify the assistant yard master, who intended to go in between the tracks, as to the approach of other cars.

You will remember the testimony shows that the assistant yard master was on the side of the track from which he could not observe that "hump," while the decedent was on the other side of the track and in a position where he had a clear view of the "hump" and the tracks leading to it; the decedent, according to the testimony of the assistant yard master, said everything was
461 all right, indicating that everything was clear; that no cars were coming by gravity from the direction of the "hump" on that same track; the assistant yard master went in between the cars to inspect the knuckle and ascertain what the difficulty was; meantime the decedent lit a cigarette, and also going in between the cars said that he would lift the pin, and in an instant or two there was a crash, which subsequently was ascertained to be on the same track, and that three or four cars came down by gravity and impinged the rear of the string of cars where the assistant yard
462 master and decedent were engaged.

Now, gentlemen, did the defendant railroad company fail in the exercise of a proper degree of care? Did it omit to protect the decedent while properly engaged in the performance of his work? You are not to presume that you should find for the plaintiff in this case because I have declined to make a direction in favor of the defendant;

you are to presume nothing whatever from my action in that regard; you must be satisfied by the evidence, without any intimation from me whatever, as to what you should believe,—whether or not the defendant railroad company owed a duty at this particular time to the decedent,—a duty which it omitted to carry out,—and as a result of which the accident and injuries were sustained. 463

The specific claim of the plaintiff is that the brakeman, Bull, was negligent in permitting the cars to come along that gravity track without stopping them and without preventing the impact. 464 The witness Bull testified that in coming down from the "hump" he had set the brakes on the forward car and on the second car; that he went over the "hump" at a rate of about four miles an hour, and, of course, you may fairly presume from the fact the brakes were set that there was a gradual reduction in the speed while the cars were coming down the track and before the impact, a distance of about 500 feet; he said he saw no men between the cars; he saw no lights, and he did not expect any; he wasn't looking for any; he did not stop the momentum of the cars; there 465 was no rule of the railroad company, or practice, providing for the stopping of the cars.

Evidence has been given by other witnesses that customarily cars are sent over this "leader" into the yard of the defendant, and into the railroad yards of other railroad companies, ad libitum,—that is, they are sent freely, one after another, to

466 classify them and to make up trains when already classified; they are defined as "live tracks,"—a dangerous place to work, gentlemen, and workmen who take upon themselves occupations of that character assume the ordinary risks of the employment; they assume the risks that are incident to the particular avocation.

As I have said, there is evidence tending to show that these cars were sent into the yards without regard to whether they impinged other cars standing in the yards or not, and the assertion on the part of the defendant is that no negli-
467 gence should be predicated against the defendant railroad company on account thereof.

Now, gentlemen, it is the rule of law that a railroad company must establish rules and make them known to their employees, to protect their workmen working in the yards, and engaged in switching operations and in other work in and about the movements of trains, and in this respect their duty is to use ordinary care and diligence to enforce any rules or regulations which it has made, and, if the company fails to exercise
468 such care, it may be held guilty of negligence if injury is sustained by workmen as the result thereof. It is submitted to you as a question of fact as to whether such rule was necessary for the protection of the decedent, and whether it should have been adopted by the defendant railroad company; certainly, you should not find that the defendant should have promulgated such rule unless you conclude from the evidence that it was a neces-

sary and practicable thing to do; if it was un- 469
necessary in view of their rules and regulations specifically directing the men not to go in between the cars, then it was, perhaps, unnecessary to make a further rule; it is for you to decide, and upon this question, gentlemen, you are obliged to consider the testimony regarding the customary way in which cars are moved over that "hump" and into the yards to make them into trains. The evidence shows, as I have already stated, these were so-called "live tracks," and strings of cars already classified, or to be classified, for carrying freight, were continually being moved, night and 470
day, by gravity into the yards for making up trains, and in doing so no regard in practice was had as to whether the cars would come in contact with other cars or not; before it is necessary for the defendant to have a rule on this subject, the plaintiff is required to prove by a fair preponderance of the evidence, that on account of the absence of such rule to safeguard and protect the decedent in his work, he sustained the injury in question, or that any rule adopted by the defendant was insufficient to properly protect him in the performance of his duty.

471

The decedent, as I have already stated, was bound to take care, and exercise diligence, and avoid any accidents from the movements of the cars in the yards and while at work. A railroad company, gentlemen, does not guarantee or insure the safety of its employees; it is merely obliged to use ordinary care to prevent unusual risks by the decedent, which, under the circumstances, and

472 the manner in which the work was ordinarily done, could not be reasonably anticipated. The defendant claims that other railroads,—the Erie Railroad Company in its yards at Buffalo, have no rules under which, in its gravity yards, cars are stopped before coming in contact with other cars already on the track and in the act of making them up into trains; there is no protection afforded by a guard or watch, except the rule that employees, yard conductors and switchmen must not go in between cars in the process of making them up into trains, without such employee having another
473 employee act as lookout and give warning of approaching danger. Such rule as that has been introduced in evidence here, and it is emphasized by the defendant; rule 180 reads as follows:

> "Employees must not go between or under cars in a train until some other member of the crew is made aware of the fact, and the latter takes the necessary precaution to prevent the train from being moved while the employee is between or under the cars."

474 Hence, I say, the defendant argues and asks you to believe from this evidence that this accident happened solely on account of the carelessness and negligence of the decedent, and that the defendant had performed its full duty when it enacted this rule,—when it specifically notified its employees, and when the yard master specifically notified the decedent that under no circumstances must he go in between cars without having some

other employee present who might warn him of impeding danger,—who might warn him of the approach of other cars on that gravity track. 475

Now, gentlemen, before reaching the conclusion that the defendant failed in its duty, you are bound to give consideration to this rule, and to this testimony to which I have directed your attention. Of course, you are not concluded by the testimony that other companies run cars into their yards in the same way, without first instructing the brakeman or switchman to stop the momentum of the cars before impinging other cars standing on the track; you are not concluded, I say, but, gentlemen, it is a fair and reasonable rule of law that what other people engaged in the same occupation do,—what care and precaution they exercise,—is a fair guide as to what one may do under similar circumstances. Such rule of protection, even though not adopted by other railroad companies, under similar conditions, is not controlling, providing you believe from the evidence that it was necessary for the protection of the workmen. 476

Now, gentlemen, I more specifically reach the subject of the defense. You will recall what the defense consists of,—first, that the defendant was not negligent; second, that the decedent was; that he was at fault, and solely at fault. Of course, you should understand, in order to apply the evidence to the law, what is ordinarily understood by the term "Contributory negligence." Contributory negligence, gentlemen, is the absence of or- 477

478 dinary care which proximately contributes to the cause of the injury. The decedent's conduct must have shown an omission of ordinary care and precaution, a failure to obey a proper rule promulgated by the defendant for his protection, or such conduct or carelessness on his part as contributed to the accident in such a way that, if it had not been for his negligence the injury would not have resulted. His negligence, however, gentlemen, does not bar a recovery, if the defendant, by the exercise of ordinary care and diligence could have avoided the mishap. Your attention is directed to the testimony of the witness Murphy, who said
479 that he did not request the decedent to come in between the cars to help him; he testified that he intended to indicate to the decedent that he was to remain outside of the gap and notify him of any danger, if any were imminent; and the contention of the defendant is that this rule which I have read was the protection which the defendant afforded, and that the defendant had the right to rely thereupon without the promulgation of any other rules. Furthermore, your attention is called to the fact that there were car repairers on hand that night, and that if the decedent had called
480 the attention of the car repairers to the defect which Murphy had discovered, it would have been wholly unnecessary for him to go in between the cars; so that the defendant's claim is that the proximate cause of the death was the negligence of the decedent in going in between the cars, when, in the proper discharge of his duty he was not required to do so.

These are all matters, gentlemen, which you are 481
required to take into consideration in order to conscientiously perform the duties which the law places upon you; it is not my intention to indicate to you, any further than I have, what you may do; I do not intend, in any manner, to indicate to you what you shall believe in reference to these facts, or whether, in your judgment, the railroad company should have promulgated some additional rule for the protection of the decedent, or not; nor do I intend to indicate to you, as matter of law, that the brakeman of certain of these cars was liable in not more fully setting the brakes and stopping the cars before impinging 482
those already on the track; those are questions I intend to submit to you as questions of fact, believing firmly that you will exercise excellent judgment in those matters.

Should you reach the conclusion that the defendant was not negligent, as I have defined the term, then that ends this case, and you need give no further attention to any other questions that have been argued by counsel and spoken of by the Court, and in such event, your verdict will be "No cause of action." 483

Should you, however, believe that the defendant was negligent,—not necessarily solely negligent—but was it negligent to any degree, as the result of which the injuries were sustained, then you will examine the question of the asserted negligence of the decedent. I do not feel called upon to instruct you, as matter of law, that the decedent

484 was negligent, and by his negligence contributed to the injury; it is clear enough that he did not obey the rule which I have read; the testimony is undisputed that the assistant yard master did not ask him to come between the cars; and, if you reach the conclusion that, in that respect, he did not exercise a proper degree of care, then, gentlemen, he contributed to the accident as the result of which the injuries were sustained.

The Employers' Liability Act, Section 3, substantially provides that in all actions hereinafter brought against common car-
485 riers engaged in interstate commerce, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where a violation by such common carrier of any statute
486 enacted for the safety of employees contributed to the injury or death of said employee. This latter provision you need not give any attention to, because it is foreign to this case. The important feature of this section which I have read is that, even though you believe the decedent was negligent, if you also believe the defendant railroad company contributed by its negligence, then there may be a division of the damages,—you may

apportion the amount of negligence,—you may di- 487
minish the damages in proportion to the amount of negligence attributable to such employee. This, gentlemen, is a new provision of law; it does not obtain in the courts of the state, and it is only applicable in this court, and where it is shown, as has been shown in this case, that the railroad company,—and it only applies to railroad companies,—was engaged in interstate commerce.

Now, gentlemen, should you reach the conclusion that this is a proper case for the award of damages, the next question that arises is the amount of the damages, and upon that question 488
I can instruct you but very little; it is always a troublesome problem to give accurate compensation under such circumstances as are here presented; there are a few rules of law, however, which juries are bound to remember, and one of them is that the damages,—if it is thought to be a sufficient case for the award of damages,—should be merely compensatory—should merely make the party whole, who has suffered damage, and you should award nothing punitive,—nothing by way of punishment; you should take into consideration that the decedent was 32 years old; 489
that he was unmarried, and that in future years he might be married; you should take into consideration the expectancy of life of the mother, who brings this action for her own benefit, viz: 14.63 years. Of course, it is always an important matter to consider what was the earning capacity of the decedent, and what did he do in his lifetime for the plaintiff, for it is she who has sustained

damage by reason of his death; his earning capacity, as I remember the testimony, was $92.00 to $93.00 per month on an average; and it has been shown by the testimony of the mother, the plaintiff, that the decedent gave her usually about $50.00 a month wherewith to provide for herself and wherewith to provide for the decedent, and to board and lodge him; these are all matters that you should take into consideration, gentlemen.

I do not know of anything further that I can say to you; I think I have fully instructed you; you may now retire and give the evidence such consideration as is required by the circumstances presented.

Perhaps I ought to state that the death of the decedent was extremely unfortunate; we are all very sorry for his mother and those relatives that he has left behind, but, a case of this character should not be determined by sympathy; you should not do as counsel for the defendant outlined to you,—as is thought to have been done sometimes by juries,—you should not say "She has lost her son and we ought to give her something." You must be satisfied, gentlemen, in order to give her an award, that it is due to her because of the negligence of the defendant railroad company, and, if you also believe that it was due to the negligence of the decedent himself, who was engaged in a risky occupation, he, as I said before, assumed the ordinary risks of his employment, then you may apportion the damages.

You may take the case. 493

Any requests?

Mr. Adams: In connection with that portion of your Honor's charge last stated, I desire to ask your Honor to charge the jury, that if they find the death of the deceased was caused solely by his own negligence, their verdict should be "No cause of action,"—there should be no damages awarded.

The Court: I so charge. I think I have already stated that. 494

Mr. Adams: I desire to except to that portion of your Honor's charge in which you submit the question of the sufficiency of the rules to the jury.

The Court: Yes, sir.

Mr. Adams: I ask your Honor to charge the jury, that in order to find a verdict for the plaintiff in this action, they must find that some negligence of the defendant was a direct and producing cause of Boldt's death. 495

The Court: I so charge.

Mr. Adams: Otherwise, that their verdict must be for no cause of action.

The Court: Yes, sir.

496 Mr. Adams: I ask your Honor to charge the jury that, if they find the defendant was negligent, and also find the decedent was negligent,—was guilty of contributory negligence, and that without the presence of the contributory negligence on the part of the decedent, the accident would not have happened, then there can be no recovery in this case; in other words, even if there was negligence on the part of the defendant in the protection of this yard,—even if they find that,—there can be no recovery here unless that was the direct proximate cause
497 of the accident.

The Court: Yes, sir, or contributory cause.

Mr. Adams: I ask your Honor to charge that the deceased was chargeable with some degree of contributory negligence, as matter of law.

Mr. Brush: I think that is a question for the jury.

498 The Court: I think I have presented that fully to the jury; I will leave that to the jury.

Mr. Adams: I except to your Honor's refusal to charge, and to the charge as made, and ask that your Honor charge the jury that the decedent assumed the obvious

necessary risks of the employment in which 499
he was engaged.

The Court: Yes, sir.

Mr. Adams: I ask your Honor to charge the jury that, if they find there was no necessity for Boldt stepping in between the cars, and that Murphy had instructed him to stand as a lookout, there can be no recovery in this case.

The Court: No. I charge them, if they believe such to be the fact,—and it is un- 500
disputed,—that that might be contributory negligence.

Mr. Adams: I except to your Honor's refusal to charge as requested, and to the charge as made; and I ask your Honor to charge that the absolute duty rested upon Boldt, under the circumstances, to ascertain whether cars were coming or not, for his own protection and for the protection of Murphy.

The Court: Yes, sir; he was required to 501
exercise reasonable care in that regard.

I will state further that the jury are the judges of the facts; they are not obliged to take counsels' narration of the facts; they must use their own memories and recollection in reviewing the facts; they are not

obliged to take my recollection of the evidence.

Mr. Adams: Along that line, in view of that portion of your Honor's charge in submitting the question of the sufficiency of the rules, I ask your Honor to charge that the undisputed evidence is that Boldt and the other yardmen were instructed not to go in between the cars without proper protection.

The Court: Yes, sir.

Mr. Brush: I except.

Mr. Adams: I ask your Honor to charge the jury that, if they find the defendant was negligent in the manner of operating this yard, or the promulgation of proper rules, and such act or omission was obvious, the risk of accident resulting therefrom is assumed by the deceased.

The Court: I decline to so charge.

Mr. Adams: Exception.

Mr. Brush: Upon the subject of the assumption of risk, I ask your Honor to charge the jury that the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the as-

sumption of risk incident to the negligence of the carrier's officers, agents or employees. 505

The Court: I decline to so charge.

Mr. Brush: Exception.

Mr. Adams: Read that request again.

The Court: Could you understand what he said Mr. Adams?

Mr. Adams: No.

(Mr. Brush re-reads request). 506

The Court: Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, "such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee."

I decline to charge as requested, because this is not an action of the kind specified in Section 4. 507

Mr. Brush: I except.

Jury retire for deliberation.

508 Jury return again into Court and say they find a verdict for the defendant of no cause of action.

And now in furtherance of justice and that right may be done, the plaintiff presents the foregoing as her bill of exceptions in this case and prays that the same may be settled, allowed and signed and certified by the Trial Judge as provided by law.

Dated, Buffalo, N. Y., Feb. 10, 1914.

HENRY W. BRUSH,
Attorney for Plaintiff.

509

STIPULATION SETTLING BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT as Administratrix, etc.,
Plaintiff,

510 vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

It is hereby stipulated that the annexed bill of exceptions in the above entitled action may be settled and allowed by the Judge who presided at

the trial of the action, and filed in the office of 511
the clerk of said Court at Buffalo, N. Y.

Dated, Buffalo, N. Y., Feb. 10, 1914.

HENRY W. BRUSH,
Attorney for Plaintiff.

FRANK RUMSEY,
Attorney for Defendant.

ORDER SETTLING CASE.

UNITED STATES DISTRICT COURT, 512
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix, etc.,
Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

The foregoing Bill of Exceptions, which con- 513
tains all of the evidence taken and proceedings had upon the trial of this action, is correct in all respects and is hereby approved, allowed and settled, and made a part of the record herein.

Dated, Buffalo, N. Y., Feb. 10, 1914.

JOHN R. HAZEL,
U. S. J.

514 PETITION FOR WRIT OF ERROR.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits of EDWARD J. BOLDT, deceased,
Plaintiff,
against
PENNSYLVANIA RAILROAD
515 COMPANY,
Defendant.

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT:

Caroline Boldt, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, deceased, plaintiff in error in the above entitled action, and plaintiff in court below, feeling herself aggrieved by the verdict of the jury hereto-
516 fore rendered in this action for no cause of action and sixty dollars and fifty-five cents ($60.55) costs, upon which judgment was entered in favor of the defendant and against the plaintiff on the 14th day of April, 1913, in the District Court of the United States for the Western District of New York, notice of entry thereof served on plaintiff's counsel April 15, 1913, comes now Caroline Boldt,

as Administratrix, etc., by her attorney Henry W. Brush, Esq., and complains that in the record and proceedings had in such cause, as well as in the rendition of said verdict, and making and entry of the said judgment herein, as aforesaid, divers manifest errors have happened to the great damage of the said plaintiff in error, as more fully appears from the assignment of errors herewith presented and submitted by the plaintiff in error and filed herein. 517

WHEREFORE, said plaintiff Caroline Boldt, as Administratrix, etc., plaintiff in error, prays and petitions for the allowance of a writ of error and for such other and further order, citation and process as may cause the said errors, and each of them, to be corrected by the said United States Circuit Court of Appeals for the Second Judicial Circuit, and this petitioner prays for a reversal of the judgment so as aforesaid rendered, and for the correction of the errors so complained of, and for such other, further and proper relief as may be just in the premises, and your petitioner will ever pray. 518

Dated, Buffalo, N. Y., Oct. 9, 1913.

519

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, deceased,

By HENRY W. BRUSH,
Attorney for Petitioner.

520 ASSIGNMENTS OF ERROR.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits of EDWARD J. BOLDT, deceased,
Plaintiff in Error,

vs.

521 PENNSYLVANIA RAILROAD COMPANY,
Defendant in Error.

The plaintiff, Caroline Boldt, as Administratrix as aforesaid, plaintiff in error above named, hereby makes the following assignment of errors upon appeal in this action from the final judgment herein to the Circuit Court of Appeals for the Second Circuit, and says that in the record and proceedings herein there is manifest error in each and every of the following rulings of the Court, all of
522 which is to the prejudice of the rights of this plaintiff in error, Caroline Boldt as Administratrix as aforesaid, and misled the jury, to wit:

I. In refusing the request of counsel for the plaintiff in error to instruct the jury in the following words:

"Mr. Brush: Upon the subject of the assumption of risk I request your Honor to

charge the jury that the risk the employe now assumes since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employes. 523

"The Court: Declined.

"Mr. Brush: Exception.

"Mr. Adams: Read that request again.

"The Court: Could you understand what he said, Mr. Adams? 524

"Mr. Adams: No.

(Mr. Brush re-reads request).

"The Court: Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.' 525

"I decline to charge as requested, because this is not an action of the kind specified in Section 4.

"Mr. Brush: I except."

II. In denying the motion of counsel for plaintiff in error, made after the verdict of the jury

526 had been rendered to set aside the verdict of the jury and grant a new trial upon the minutes of the Court, and upon the exceptions in the case, and upon the ground that the verdict was contrary to and against the weight of the evidence and contrary to law.

WHEREFORE, the said Caroline Boldt, as Administratrix as aforesaid, plaintiff in error, prays that the judgment in this case entered in the office of the Clerk of the United States District Court for the Western District of New York, on the 14th day of April, 1913, for no cause of
527 action and $60.55 costs, notice of entry of which was given to plaintiff's counsel herein on the 15th day of April, 1913, be reversed, and that the said District Court be directed to grant a new trial of said cause, and for such other and further relief as may be proper.

Dated, Buffalo, N. Y., Oct. 9th, 1913.

HENRY W. BRUSH,
Attorney for Caroline Boldt, as Administratrix, etc., Plaintiff in Error.

528

ORDER GRANTING WRIT OF ERROR. 529

At a Stated Term of the District Court of the United States, held in and for the Western District of New York, at the General Postoffice Building, in the City of Buffalo, and State of New York, on the 10th day of October, 1913.

Present:

HONORABLE JOHN R. HAZEL,
District Judge.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits of EDWARD J. BOLDT, deceased, 530

Plaintiff,

against

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

Upon reading and filing the petition of the plaintiff, Caroline Boldt, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, 531 deceased, dated the 9th day of October, 1913, for a writ of Error herein, and the Assignment of Errors of the plaintiff, herewith filed, and upon all the papers and proceedings herein, and

On motion of Henry W. Brush, Esq., attorney for plaintiff, it is

ORDERED, that a writ of Error, be and the

532 same hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Second Judicial Circuit the judgment heretofore made and entered herein on the 14th day of April, 1913, notice of entry served on the 15th day of April, 1913.

And the said plaintiff in error, Caroline Boldt, as Administratrix, etc., having filed a good and sufficient bond in the sum of Two hundred and fifty dollars ($250.00) that she will prosecute the writ of error to effect, and if she fails to make good her plea shall answer all damages and costs,
533 and the said security having been duly approved by the Court, it is

ORDERED, that execution on the said judgment in favor of the said defendant and against the said plaintiff, be, and the same hereby is, stayed, pending such writ of error.

JOHN R. HAZEL,
U. S. J.

WRIT OF ERROR.

534 UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES TO THE HON. JOHN R. HAZEL, THE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition, making and entry of a judgment

in favor of the defendant and against the plain- 535
tiff for no cause of action and sixty dollars and fifty-five cents ($60.55) costs, on the 14th day of April, 1913, notice of entry being given April 15, 1913, in the District Court of the United States for the Western District of New York, before you, in an action wherein Caroline Boldt, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, deceased, was plaintiff, and Pennsylvania Railroad Company was defendant, manifest error hath happened, to the great damage of the said plaintiff, as by her petition, complaint and assignment of errors appears:

536

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to parties aforesaid in this behalf, do command you that under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Second Judicial Circuit, together with this writ, so that you may have the same at the Postoffice building in the Borough of Manhattan, City, County and State of New York, on the 8th day of November, 1913, in the said Circuit Court of Appeals for the Second Judicial Circuit, to be then 537
and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Second Judicial Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

538 WITNESS, the HON. EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of October, in the year of our Lord, one thousand nine hundred and thirteen.

S. W. PETRIE,
Clerk of the United States District Court for the Western District of New York.

The foregoing writ of error is hereby allowed this 10th day of October, 1913.

539 JOHN R. HAZEL,
U. S. J.

CITATION UNDER WRIT OF ERROR.

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO PENNSYLVANIA RAILROAD COMPANY, DEFENDANT IN ERROR, AND FRANK RUMSEY, ITS ATTORNEY, GREETING:

540 YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Second Judicial Circuit, to be held at the Postoffice Building in the Borough of Manhattan, in the City, County and State of New York, on the 8th day of November, 1913, pursuant to a writ of error

filed in the office of the Clerk of the United States 541
District Court for the Western District of New York, on the 10th day of October, 1913, wherein Caroline Boldt, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, is plaintiff in error and Pennsylvania Railroad Company is defendant in error, to show cause, if any there be, why the judgment, record and proceedings in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the HON. EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of 542
the United States of America, this 10th day of October, 1913.

JOHN R. HAZEL,
United States District Judge
sitting in the Circuit Court.

548

544 STIPULATION.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF NEW YORK.

CAROLINE BOLDT as Administratrix, etc.,
Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

545

It is hereby stipulated by the parties hereto, by their respective attorneys, that the foregoing is a true transcript of the record on appeal herein, and that the same shall be printed as the record on appeal in the above entitled action.

Dated, February 10th, 1914.

HENRY W. BRUSH,
Attorney for Plaintiff.

546

FRANK RUMSEY,
Attorney for Defendant.

CLERK'S CERTIFICATE. 547

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK. } ss.:

I, SIDNEY W. PETRIE, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing and annexed printed copy has been presented to me with a stipulation by the attorneys of the parties that such printed copy is a true transcript of the record on appeal to the United States Circuit Court of Appeals, Second Circuit, from a judgment and order of the United 548
States District Court for the Western District of New York in the action in said District Court entitled Caroline Boldt, as Administratrix of the goods, chattels and credits which were of Edward J. Boldt, deceased, against Pennsylvania Railroad Company, as agreed on by the parties, and I do certify the same to be the transcript of record on said appeal.

IN TESTIMONY WHEREOF, I have caused the seal of the Seal of Court, said Court to be affixed at the City of Buffalo, in said District, this
20th day of February, 1914. 549

S. W. PETRIE,
Clerk.

[SEAL OF COURT]

United States Circuit Court of Appeals for the Second Circuit, October Term, 1914.

Argued October 20, 1914. Decided November 10, 1914.

No. 45.

CAROLINE BOLDT, as Administratrix, etc., Plaintiff in Error,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Western District of New York.

Before Lacombe, Coxe, and Ward, Circuit Judges.

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York, entered upon a verdict in favor of defendant in error, who was defendant below. The action is brought under the Federal Employers' Liability Act, to recover damages on account of the death of plaintiff's intestate (hereinafter referred to as deceased) which, the complainants alleges, resulted from the negligence of defendant.

LACOMBE, *C. J.*:

The only point raised on this writ of error which calls for any discussion is the exception to a request to charge that

"The risk the employee now assumes since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents or employees."

Deceased was a yard conductor. He was at work in what is known as a "gravity yard", in which cars are pushed up to the crest of a hump and are then allowed to run down, singly or in groups, under the control of a brakeman, into a fan-shaped arrangement of tracks intended for the making up of trains. He was at work on a car on track 4, one of a group of five cars forming one end of a train to be made up. Some additional cars to be attached to these had been brought down into contact but the two sections failed to couple. These cars were then drawn off 20 to 30 feet and deceased and an assistant superintendent went to examine and overhaul the coupler. While thus engaged another group of cars came over the hump and ran down on track 4, striking the head group and driving them down over deceased.

The charges of fault were two-fold, negligence in failing to promulgate a rule which would require a lookout to be posted to ward of- approaching cars and negligence in operating its cars so as to come down on standing cars with force sufficient to drive them on. Defendant had promulgated a rule, which reads

"Rule 180. Employees must not go between or under cars in a train until some other member of the crew is made aware of the fact and the latter takes the necessary precautions to prevent the train from being moved while the employee is between or under the cars."

The testimony abundantly sustains the conclusion that deceased violated this rule. His violation of the rule, however, is important only on the question of contributory negligence, which under the Federal Act would require merely an apportionment of damages, if defendant were also found negligent. The court so instructed the jury.

The court left it to the jury to say whether or not Rule 180 was a sufficient rule to adopt, telling them that if they concluded that it was insufficient they might find defendant negligent. It went further and instructed the jury specifically that it was for them to decide whether it was necessary for the defendant to make and enforce some rule to regulate the movement of cars sent over the hump so that they would not impinge on other standing cars—a practice usual in this yard and in other railroad yards generally. The court also instructed the jury that assumption of obvious risk would bar recovery under the Federal Employers' Liability Act in cases, not coming within Sec. 4 of that Act, which is in accord with the decision of the Supreme Court in Seaboard Air Line v. Horton, 233 U. S., 492. We think the plaintiff was not entitled to have the jury instructed in the manner he requested. If negligent operation of the cars by deceased's fellow-servants caused the violent striking of the standing cars by other cars running down from the hump, it was a negligent operation of almost daily occurrence; there was a rule to regulate the speed of the moving cars and the practice of running them down on standing cars was a practice usual in this yard and in other railroad yards generally. Defendant presumably assumed that the enforcement of Rule 180 would make the practice harmless. If it was a negligent mode of operation it was a mode obvious to deceased and we cannot see why, under the Seaboard Air Line case (supra) the jury might not find that such usual operation was a risk which he assumed.

Judgment affirmed.

Submitted for the Plaintiff in Error.
H. A. Adams for the Defendant in Error.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 20th day of November, one thousand nine hundred and fourteen.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Henry G. Ward,
Circuit Judges.

CAROLINE BOLDT, as Administratrix, etc., Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

Error to the District Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Caroline Boldt vs. Penn. R. R. Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 20, 1914. William Parkin, Clerk.

United States Circuit Court of Appeals in and for the Second Circuit.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels, and Credits of Edward J. Boldt, Deceased, Plaintiff in Error,
against
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

Caroline Boldt, as Administratrix of the goods, chattels and credits of Edward J. Boldt, deceased, plaintiff in error in the above entitled action, and plaintiff in the court below, considering herself aggrieved by the final decision and judgment herein of the Circuit Court of Appeals in and for the Second Circuit, entered on the 21st day of November, 1914, and by the judgment of the District Court of the United States for the Western District of New York entered pursuant to the mandate of said Circuit Court of Appeals on the 31st day of

December, 1914, hereby prays that a writ of error from the said decision and judgments to the Supreme Court of the United States may issue, and further prays for a reversal of said judgments so rendered, with costs. Her assignments of error are presented herewith.

Dated Buffalo, N. Y., Nov. 9th, 1915.

CAROLINE BOLDT,
As Administratrix of the Goods, Chattels, and Credits of Edward J. Boldt, Deceased,
By HENRY W. BRUSH,
Attorney for Petitioner.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Caroline Boldt, as Administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, Plaintiff-in-Error, against Pennsylvania Railroad Company, Defendant-in-Error. Petition for Writ of Error. Henry W. Brush, Attorney for Petitioner, 113 Erie County Bank Bldg., Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1915. William Parkin, Clerk.

At a Stated Term of the Circuit Court of Appeals of the United States, held in and for the Second Judicial Circuit, at the Post Office Building, in the City of New York, on the 12" day of November, 1915.

Present: Hon. E. Henry Lacombe, Chief Judge.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels, and Credits of Edward J. Boldt, Deceased, Plaintiff in Error,
against
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

On reading and filing the petition of the plaintiff in error, Caroline Boldt, as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, deceased, for a Writ of Error herein to the Supreme Court of the United States, and the assignments of error of the plaintiff in error herewith filed, and upon all the papers and proceedings herein, and on motion of Henry W. Brush, Esq., attorney for said plaintiff in error, it is

Ordered: That a Writ of Error be and the same hereby is allowed, to have reviewed in the Supreme Court of the United States, the judgment of affirmance of this Court made and entered herein on the 21st day of November, 1914, and the Judgment of the District Court of the United States for the Western District of New York, entered pursuant to the Mandate of this Court on the 31st day of December, 1914, and the said plaintiff in error having filed a good and sufficient bond in the sum of two hundred and fifty dollars ($250.00) that she will prosecute the writ of error to effect, and if she fails to make good her plea, shall answer all damages and costs, and the said security having been duly approved by this Court, it is

Ordered, that execution on said judgment in favor of said defend-

ant in error, be and the same hereby is stayed pending such writ of error.

E. HENRY LACOMBE, *U. S. C. J.*

Endorsed: United States Circuit Court of Appeals, Second Circuit. Caroline Boldt, as Administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, Plaintiff in Error, against Pennsylvania Railroad Company, Defendant in Error. Order allowing Writ of Error. Henry W. Brush, Attorney for Plaintiff in Error, 113 Erie County Bank Bldg., Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals in and for the Second Circuit.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels, and Credits of Edward J. Boldt, Deceased, Plaintiff-in-Error,
against
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

Know all men by these presents: That we, Henry W. Brush, of the City of Buffalo, County of Erie and State of New York, and Charles W. Dille, of the City of Cleveland, County of Cuyahoga, State of Ohio, are held and firmly bound unto Pennsylvania Railroad Company, its successors and assigns, in the full and just sum of two hundred and fifty ($250.00) Dollars, to be paid to the said Pennsylvania Railroad Company, its certain attorney, successors and assigns to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 9th day of Nov. 1915.

Whereas, lately at a stated term of the United States Circuit Court of Appeals, in and for the second Circuit, in a suit depending therein between Caroline Boldt, as Administratrix of the goods, chattels and credits of Edward J. Boldt, deceased, Plaintiff-in-Error, and Pennsylvania Railroad Company, Defendant-in-Error, final judgment was rendered against said plaintiff-in-error, affirming the judgment of no cause of action theretofore rendered in said action by the District Court of the United States for the Western District of New York, and

Whereas, upon the Mandate of the said United States Circuit Court of Appeals, to it directed, the District Court of the United States in and for the Western District of New York has rendered final judgment to that effect, and its judgment has been duly entered in the office of the clerk thereof, pursuant thereto, and awarding the defendant-in-error costs to the amount of $25.00, and

Whereas the said plaintiff-in-error has applied for, or is about to apply for, a writ of error to the Supreme Court of the United States, for a review of the said judgments,

Now therefore the condition of this obligation is such that if the

above named plaintiff-in-error, Caroline Boldt, as Administratrix as aforesaid, the plaintiff-in-error in said Supreme Court of the United States, shall prosecute her said writ of error to effect, and answer all costs and damages that may be adjudged against her if she fail to make good her plea, then this obligation to be void, otherwise to remain in full force and effect.

HENRY W. BRUSH. [L. S.]
CHARLES W. DILLE. [L. S.]

UNITED STATES OF AMERICA,
State of New York,
County of Erie, ss:

On this 9" day of November 1915 before me the subscriber, personally appeared Henry W. Brush, to me personally known and known to me to be the person described in — who executed the foregoing instrument, and he duly acknowledged to me that he had executed the same.

[SEAL.] JOHN E. MONTGOMERY,
Notary Public, Erie Co., N. Y.

UNITED STATES OF AMERICA,
State of Ohio,
County of Cuyahoga, ss:

On this 10" day of November 1915 before me the subscriber personally appeared Charles W. Dille, to me personally known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he had executed the same.

[SEAL.] G. W. ROSENBERG,
Notary Public.

UNITED STATES OF AMERICA,
State of New York,
County of Erie, ss:

Henry W. Brush being duly sworn says that he is a resident of and freeholder within the State of New York and County of Erie, and is over the age of twenty one years. That he is one of the sureties named in the foregoing bond, and that he is reasonably worth the sum of Five Hundred ($500.00) Dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

HENRY W. BRUSH.

Subscribed and sworn to before me this 9" day of November 1915.

[SEAL.] JOHN E. MONTGOMERY,
Notary Public, Erie Co., N. Y.

UNITED STATES OF AMERICA,
State of Ohio,
County of Cuyahoga, ss:

Charles W. Dille, being duly sworn says that he is resident of and householder within the State of Ohio and County of Cuyahoga, and is over the age of twenty one years. That he is one of the sureties named in the foregoing bond, and that he is reasonably worth the sum of Five Hundred ($500.00) Dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

CHARLES W. DILLE.

Subscribed and sworn to before me this 10" day of November 1915.

[SEAL.] G. W. ROSENBERG,
Notary Public.

The foregoing bond is hereby approved and allowed as a supersedeas.

Dated Nov. 12, 1915.

E. HENRY LACOMBE,
Judge U. S. Circuit Court of Appeals in and for the Second Circuit.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Caroline Boldt, as Administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, Plaintiff-in-Error, against Pennsylvania Railroad Company, Defendant-in-Error. Bond. Henry W. Brush, Attorney for Plaintiff-in-Error, 113 Erie County Bank Bldg., Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals, Second Circuit.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels, and Credits of Edward J. Boldt, Deceased, Plaintiff in Error,
against
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

The plaintiff in error, Caroline Boldt, as Administratrix as aforesaid, herewith files her petition for a writ of error in this action, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments of error.

First. The Circuit Court of Appeals, aforesaid, erred, and the District Court of the United States for the Western District of New York, when it followed the Mandate of the said Circuit Court of Appeals did err, in that it ordered and adjudged that the judgment of the District Court of the United States for the Western District of New York then under review by said Circuit Court of Appeals should be affirmed with costs.

Second. The Circuit Court of Appeals, aforesaid, and the District Court when it acted pursuant to the direction of that court, erred when it refused to reverse the judgment of said District Court aforesaid by reason of the errors appearing upon the record of the trial thereof, as follows:

I. In refusing the request of counsel for the plaintiff in error to instruct the jury in the following words:

"Mr. Brush: Upon the subject of the assumption of risk, I request your Honor to charge the jury that the risk the employe now assumes since the passage of the Federal Employers' Liability Act, is the ordinary danger incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employes.

The Court: Declined.

Mr. Brush: Exception.

Mr. Adams: Read that request again.

The Court: Could you understand what he said, Mr. Adams?

Mr. Adams: No.

(Mr. Brush reads request.)

The Court: Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.'

I decline to charge as requested, because this is not an action of the kind specified in Section 4.

Mr. Brush: I except."

II. In denying the motion of counsel for plaintiff in error, made after the verdict of the jury had been rendered to set aside the verdict of the jury and grant a new trial upon the minutes of the Court, and upon the exceptions in the case, and upon the ground that the verdict was contrary to and against the weight of evidence and contrary to law.

Third. Said Circuit Court of Appeals erred in that it held that the plaintiff in error was not entitled to have the jury instructed in the manner shown in the foregoing language.

Fourth. Said Circuit Court of Appeals erred in holding that plaintiff's intestate assumed the risk of the operation of the cars in the manner shown in the record.

For which errors the plaintiff in error, Caroline Boldt as Administratrix as aforesaid, prays that the judgment of the Circuit Court of Appeals rendered Nov. 21st, 1914, and the judgment of the District Court of the United States for the Western District of New York entered pursuant to the mandate of said Circuit Court of Appeals on the 31st day of December, 1914, and the judgment of the said District Court of no cause — action rendered April 14, 1913, be reversed with costs, and a new trial of said action directed.

HENRY W. BRUSH,
Attorney for Plaintiff in Error,
113 *Erie County Bank Bldg., Buffalo, N. Y.*

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Caroline Boldt, as Administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, Plaintiff-in-Error, against Pennsylvania Railroad Company, Defendant-in-Error. Assignments of Error. Henry W. Brush, Attorney for Plaintiff-in-Error. 113 Erie County Bank Bldg., Buffalo, N. Y. United States Ci Court of Appeals, Second Circuit. Filed Nov. 12, 1915. Wil Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court o peals for the Second Circuit, do hereby Certify that the fore pages, numbered from 1 to 200 inclusive, contain a true and co transcript of the record and proceedings had in said Court, in th of Caroline Boldt, as Administratrix, etc., against Pennsyl Railroad Company as the same remain of record and on file i office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of December in the year of our Lord One Thousand Nine Hundred and fifteen and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 12/8. Wm. P.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Pennsylvania Railroad Company, Defendant in Error, Greeting:

You are hereby cited and admonished to appear at and before the Supreme Court of the United States, at Washington, D. C., on the 12th day of December, 1915, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals, in and for the Second Judicial Circuit, wherein Caroline Boldt as Administratrix of the Goods, Chattels and Credits of Edward Boldt, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to parties in that behalf.

Witness, Hon. Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 12th day of November, 1915.

E. HENRY LACOMBE,
Judge U. S. Circuit Court of Appeals, Second Circuit.

I, Frank Rumsey, attorney for the defendant in error, in the above mentioned cause, hereby acknowledge service of the above citation, and enter an appearance in the Supreme Court of the United States.
Dated Nov. 13, 1915.

FRANK RUMSEY,
Attorney for Defendant in Error.

[Endorsed:] United States Circuit Court of Appeals, Second Cir-t. Caroline Boldt, as Administratrix of the goods, chattels, and dits of Edward J. Boldt, deceased, Plaintiff-in-Error, against nsylvania Railroad Company, Defendant-in-Error. Citation. nry W. Brush, Attorney for Plaintiff-in-Error, 113 Erie County nk Bldg., Buffalo, N. Y. United States Circuit Court of Appeals, ond Circuit. Filed Nov. 20, 1915. William Parkin, Clerk.

ITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Circuit Court of Appeals of the United States in and for the Second Judicial Circuit and the Judges thereof, Greeting:

Because in the record and proceedings as also in the rendition, making and entry of the judgment of a plea which is in said Court, before you, in which Caroline Boldt as Administratrix of the Goods, Chattels and Credits of Edward J. Boldt, deceased, is plaintiff in error, and Pennsylvania Railroad Company, is defendant in error, said judgment having been entered November 21st, 1914, and being a judgment affirming a judgment in favor of the defendant in error of no cause of action rendered theretofore by the District Court of the United States for the Western District of New York, the Mandate of said Circuit Court of Appeals having been duly filed and judgment entered thereupon by said District Court of the United States on the 31st day of December, 1914, said action being based upon, and wherein was drawn in question, the construction of a statute of the United States; manifest error hath happened to the great damage of said Caroline Boldt as Administratrix as aforesaid, as by her petition, complaint and assignments of error appear.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of

the United States, the 12th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

Allowed Nov. 12, 1915.

E. HENRY LACOMBE,

Judge United States Circuit Court of Appeals, Second Circuit.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Caroline Boldt, as Administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, Plaintiff-in-Error, against Pennsylvania Railroad Company, Defendant-in-Error. Writ of Error. Henry W. Brush, Attorney for Plaintiff in Error, 113 Erie County Bank Bldg., Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 20, 1915. William Parkin, Clerk.

Endorsed on cover: File No. 25,039. U. S. Circuit Court Appeals, 3d Circuit. Term No. 315. Caroline Boldt, administratrix of the goods, chattels, and credits of Edward J. Boldt, deceased, plaintiff in error, vs. The Pennsylvania Railroad Company. Filed December 13th, 1915. File No. 25,039.

(25,038)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. [redacted]62

Caroline Mohr, as Administratrix of the Goods, Chattels and Credits of Edward J. Mohr, Deceased,

Plaintiff-in-Error,

vs.

The Pennsylvania Railroad Company,

Defendant-in-Error.

SUBJECT INDEX.

List of Cases Referred To.

Supreme Court of the United States.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits, which were of EDWARD J. BOLDT, deceased,

Plaintiff in Error,
(Plaintiff below)

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant in Error,
(Defendant below).

BRIEF FOR PLAINTIFF IN ERROR.

This action, commenced October 1st, 1912, was brought by the plaintiff, under the Federal Employers' Liability Act, to recover damages from the defendant for negligence resulting in the death of plaintiff's intestate. The defendant's answer served October 25th, 1912, put in issue all the allegations of the complaint except its incorporation, the ownership and maintenance of its railroad as

an interstate common carrier, and its employment of plaintiff's intestate in such interstate business at the time of the accident, and set up the affirmative defenses of assumption of risk, contributory negligence and also a defense of release through payment of benefits from defendant's relief department of which no evidence, however, appears in the record (pp. 11-17).

The action was brought to trial in December, 1912, before Hon. John R. Hazel, District Judge and a jury, and a verdict rendered in favor of the defendant of no cause of action, upon which judgment was entered. Plaintiff's motion to set aside the verdict and for a new trial was denied by the Trial Court with an opinion (pp. 25-7). Thereafter the plaintiff filed Assignments of Error (pp. 174-6), and obtained a Writ of Error (pp. 178-80) to the Circuit Court of Appeals, Second Circuit. The Circuit Court of Appeals affirmed the judgment of the District Court, by order entered Nov. 20th, 1914 (p. 186), with an opinion by Lacombe, C. J. (pp. 184-5), whereupon the plaintiff in error obtained a writ of error to this court, the proceedings thereupon being printed at pp. 186-194. The Assignments of Error to the Circuit Court of Appeals are printed at pp. 190-1. The citation upon the writ was duly served upon the attorney for the defendant in error, who admitted service (pp. 192-3). The return was filed in the office of clerk of this court, December 13th, 1915, with a file number of 25,039 (p. 194).

QUESTION FOR REVIEW.

The only question for review by this court relates to the nature and classification of the risks assumed by plaintiff's intestate, and the same is raised by an exception to the refusal of a request for specific instructions to the jury, which request will be hereinafter set forth in extenso as a Specification of Error, and is to be read in connection with the instructions of the court upon the subject of assumption of risk hereinafter quoted. An intelligent disposition of the questions thus raised requires a consideration of all of the facts of case, and of the claims of the parties thereupon, embodied in the following:

STATEMENT OF FACTS.

It appears that at the time of the accident in question the defendant, an interstate carrier, operated in connection with its terminal in the City of Buffalo what is known as a "gravity yard," for the purpose of classifying freight and making up its freight trains. The general arrangement of such a yard is undoubtedly familiar to the court, but briefly stated it consists of a railroad track passing over what is known as a "hump," or elevation, the track descending from the hump becoming the lead, or ladder track of a yard, the yard tracks branching out from and being connected with the hump or ladder track, with the usual switches, the crown of the hump, in this instance, being about seven feet above the general level of the yards (pp. 36-8, 106). The yard in question had two hump or lead tracks, as shown by the blue print, Exhibit P-2, and between these two lead

tracks lay the classification or yard tracks numbered one to nine inclusive. These two lead tracks branch out from the hump track to the north and to the south at equal angles, so that the middle track, or track 5, was a continuation of the hump track on a straight line, the tracks to the north of track 5 being numbered from 5 to 10, and those to the south of track 5 being numbered from 1 to 5. The plan of the yard can be readily understood by a glance at the blue print.

The plan of operation of the gravity yard calls for the bringing of the cars to the top of the "hump" from either end by a locomotive, whereupon they are cut off by a switchtender, who switches them onto whichever one of the several tracks their train is being made up upon, down which track they proceed by gravity such a distance as conditions call for. The conductor of the "hump" engine which brings up the cars indicates to the switchtender where the cars shall be switched to. The conductor understands where all the cars go, and he puts them in whichever tracks they are making up trains on. He knows which one of the several tracks are to contain certain trains, and he knows when they are completely made up (p. 36, fol. 108, p. 37).

On the 11th day of October, 1911, plaintiff's intestate was, and for some years had been in the employ of this defendant as a yard conductor (p. 12, fol. 35), and his duties consisted, among other things, in the making up, under the direction of the yard master and his assistants, of freight trains upon these tracks of the gravity yard from the cars sent in in the manner hereinbefore described (pp. 35-36). On the evening of the day in question he

was engaged in assisting the assistant yard master, Mr. James J. Murphy, in the making up of a train known as second 94, a fast freight running from Buffalo to Emporium, Harrisburg, and Philadelphia, Pennsylvania. It was made up mainly of cars destined for Pennsylvania points and beyond, the cars being arranged in the order in which the stations came (pp. 38-9). At about 8 p. m. the day of the occurrence in question, the making up of the whole train had been completed, the rear part of the train with the caboose attached lying at the north end of track 2, and the front of the train, consisting of nineteen cars with the engine attached, lying on track 4, the next operation being to pull out the part of the train lying on track 4, back it in on track 2 and couple on to the balance of the train, whereupon the whole train would be ready for final inspection by the inspectors and air brake men, following which it would be ready for its run (pp. 39-41). Murphy and Boldt were over toward track 10, attending to the switching of a car, they just previously having completed the make-up of the rear portion of their train on track 2 (pp. 79-80). The four rear cars of the nineteen on track 4 were separated from the rest of the string by about two hundred and fifty feet (p. 42), the fifteen cars having been backed in there from the south in one cut (p. 80), and the four presumably having come down from the "hump." Murphy and Boldt walked over from track 10 to track 4 for the purpose of directing the coupling up of these four cars preparatory to the operation of "doubling over" onto track 2, Murphy being some little distance in advance of Boldt (pp. 79-80). Murphy found the four cars and signalled the engineer to

back up the rest of the train and couple on. This being done, he ascertained that the automatic coupling failed to "make." He then had the fifteen cars pulled away about ten feet, opened the knuckle and had the operation repeated, and the coupling still failed to "make." Upon the second attempt he held his lamp to the coupling and ascertained that both knuckles of the coupling closed but they did not meet, and that the "lug" of the knuckle in the coupler of the first one of the four cars was broken. He then had the engineer draw off the string so that there was an opening of about twenty feet between the end of the string and the first of these detached cars, and stepped into the space between the cars to determine if the knuckle could be closed (pp. 42-44).

Murphy demonstrated the condition of this coupler orally and by means of a model (pp. 34, 68-72), and we shall expect to do the same upon argument, the principal fact of importance to this case being that the tongue or "lug" of the knuckle coupled with the corresponding part on the coupler of the other car and was locked by a pin which slid in from the bottom up. It was this "lug" which was broken off and Murphy testified that his object in going between the cars was to get this broken piece out with his fingers, close the knuckle up and open the one on the other car, so that the coupler would hold sufficiently to enable him to get the car over to track 2, where he intended to have it repaired (pp. 57, 72).

The point at which Murphy stepped between the tracks was about five hundred feet from the top of the "hump" and about two hundred feet from

the "hump" end of track 4, and was in the level part of the yard, although the cars between him and the "hump" were on a slight grade (pp. 42, 59, 88).

The yard was poorly lighted at this point, there being but two arc lights on this side of the yard, one at the scale house on the crown of the hump, five hundred feet away, and the other somewhere between tracks 7 and 8, but not more definitely located (p. 59, fol. 176).

Just as Murphy stepped upon track 4 to make his examination Boldt arrived. Murphy said to him, "The lug of the knuckle is broken" (pp. 42-4). Just at that moment cars were heard coming in on an adjoining track, which transpired to be track 3. Murphy, thinking they might be coming on track 4, jumped off from that track into the space between 3 and 4 (p. 45, fol. 133). Murphy testified that he then said to Boldt, who was standing between 4 and 5, 5 being the straight track to the "hump," and at that time clear of cars:

> "I said to Eddie, 'Those cars went into number 3.' I said, 'How does she look?' At that time he lit a cigarette; he said, 'She looks all right, go ahead.' When I asked Boldt how she looked I meant if there was any cars coming in on track 4. That was the first conversation had taken place between us." (P. 45, fols. 133-4).

And later:

> "And when he made that remark, 'All right, go ahead,' I went in and got hold of

> the knuckle and was just adjusting it when he turned around and he said, 'Wait, I will hold the pin.'" (P. 45, fols. 134-5).

The foregoing was all the conversation had between them prior to the accident. Murphy had worked on the coupler but a few seconds when Boldt said, "Wait, I will hold the pin" (p. 88, fol. 263). It appears that then Boldt stepped over the rail of track 4 with at least one foot and took hold of the pin of the coupler, so as to shove it up when Murphy had the knuckle adjusted. He had hardly taken hold of the pin when a cut of five cars which, unseen by anybody, had come in upon track 4 from the "hump" crashed into the cars upon which Murphy and Boldt were working with such violence as to cause them to move forward sufficiently to close up completely the twenty foot gap which had been left in the train. Murphy was thrown between the rails and escaped serious injury. Boldt was thrown across the rail and killed (pp. 45-50, 59-61). There was no warning of any kind of this cut of cars coming in on track 4 (p. 51). It is maintained by the plaintiff that operating necessity did not require that these cars should impinge and couple up with those ahead of them at all, but if it was to be considered necessary, the force of their contact was excessive over that required to make a coupling. Murphy testified upon this subject (p. 50):

> "These impact couplers are what the name signifies—couplers to couple by impact—when they are brought together the knuckles join. There is not much force required to make the coupling. A mere touch is suffi-

cient to make the knuckles join, just long enough to cause a pressure so that they would come together."

This cut of five cars was ridden down from the "hump" by a brakeman, Frank Bull, known as a "rider." He testified for the defense that they went off from the "hump" at the rate of about four miles per hour, and that he gradually slackened them up, using two brakes, one on the north end of the leading car, and the other on the south end of the following car. The brakes were in good order. That he was accustomed to riding these cuts of cars down in there so that they would go about fast enough not to smash the cars, and paid no attention to the employees working about the cars. He also testified that about two minutes elapsed between the time the cut of cars was cut off on the "hump" until it collided with the cars on track 4 (pp. 135-8). As the conductor of the hump engine, witness Teeling, testified that he watched from the "hump" the cut go down and saw it clear the "lead" (p. 115, fol. 343), and as Murphy testified that but a few seconds elapsed after Boldt said "She looks all right, go ahead," before the crash came, it is apparent that when Boldt looked up track 5 to the hump, at the time of making the remark, either, the switch light at the entrance to track 4 showed clear by reason of the cut having already gone in, or the cut was partly on track 4 and partly on the entrance thereto, in which event it would have hidden the switch light. In either event the conditions of light were such that it would have been very difficult for Boldt to have made out these cars at the distance of 200 feet, or to distin-

guish them from the rear of the string of four cars upon which he was working, and more difficult than all to determine if they were moving.

A rule was read in evidence, Rule 180, marked Exhibit P-3 (p. 76), which reads as follows:

> "Employees must not go between or under cars in a train until some other member of the crew is made aware of the fact, and the latter take the necessary precautions to prevent the train from being moved while the employee is between or under the cars."

The defense claimed that Boldt's attention had been called to this rule (p. 139).

But another rule was offered in evidence, Rule 707 (pp. 84-5), concerning the duties of freight conductors which is somewhat out of harmony with the foregoing rule. The parts specially applicable are as follows:

> "The freight conductor reports to and receives his instructions from the trainmaster. He must obey the orders of yardmasters. He must report for duty at the appointed time, and see that the trainmen are ready for duty; see that he has the proper waybills for the cars to be moved; assist in making up his train when necessary; see that the engine and train are provided with full sets of signals; see *that the couplings and brakes are in good order before starting, and inspect them as frequently as opportunity permits;* see that the trainmen occupy their proper places on the train, handle freight

> with care, using every effort to prevent loss or damage; see that doors of cars are properly secured, and not permit unauthorized persons to enter the cars, handle freight or ride upon the train."

Witness Colegrove for the defense claimed that this rule only refers to road conductors (p. 138), but admitted on cross examination that it was the yard conductor's duty to see that the cars were properly coupled together before being moved, and that there was no other rule referring specially to yard conductors (pp. 144-6). Conductor Teeling also testified that it was the yard conductor's duty to see that the couplings, air brakes and equipment is in proper shape and in safe condition to move (pp. 120-1).

It appears at various places in the evidence that notwithstanding the fact that the final inspection of the train as to coupling, air brake apparatus and the like is performed at the time that the cars are all assembled on one track ready to start, at which time the inspectors lock the switches at each end of the track and put up blue signals (pp. 121-2), and that no extensive repairs of any kind are made by the car repairers without like precautions, yet nevertheless when a string of cars or part of a train is being transferred from one track to another there are many trifling and momentary inspections, manipulations and adjustments such as the coupling together of the ends of air hose, the fitting of a dragging brake beam, or, as in this case, the temporary adjustment of a damaged coupler, which could not be performed without the man going between the cars, and manifestly at times when it

would be impracticable to post a lookout (pp. 81-2, 100-1, 122-3, 125, fol. 374, p. 142). The necessity for the visual inspection of this damaged coupling was shown by one of defendant's witnesses (p. 142) as follows:

> "Q. In the case before us here do you know of any way in all of your years in railroading that you could have told the condition the lug of that knuckle was in under the circumstances without stepping in there and looking into the face of it?
>
> A. No, sir.
>
> Q. In other words that was the only way it could be done?
>
> A. Yes, sir, that is the only way it could be done."

On the part of the defense it appears specifically that these gravity tracks 1-10 inclusive are continuously used and treated as "live" tracks, day and night, with cars constantly being put in upon them regardless of the safety of employees working upon them. That as long as there is room upon a track and it is not locked or a blue signal out, the "hump" crews are authorized to place cars thereupon; that the employees at work thereon are supposed to seek their own protection, and this irrespective of whether or not a train be made up on that particular track. That other railroads follow the same practice. That the only instructions given regarding care are with reference to the damaging of cars or freight (pp. 54, 59, 63-4, 96-8, 110-13, 117-19, 129, 140-1).

On the foregoing statement of facts, which embraces a reference to all of the evidence which seems to us of importance to the case, the claims of the parties were as follows:

The defendant claimed, if we apprehended its attitude correctly:

1st. That no negligence was shown in the operation of the yard. That their free and unrestricted use of the gravity tracks without protection to their employees other than a rule forbidding them to go between the cars without providing for their own protection, was a proper use of such tracks and that no negligence could be predicated thereon.

2nd. That Boldt's death was due solely to his own negligence in failing to see the approaching cut of cars when posted as a lookout therefor, and in going between the cars in violation of the rule.

3rd. That Boldt assumed the risk of just such an accident as happened (pp. 95-6, 147-8).

The plaintiff claimed:

1st. That Boldt was not posted as a lookout and had no duty of that nature. That he was present not in that capacity, but in order to do everything possible to expedite the readiness of his train. That his only duty was to exercise ordinary care to see that no cars were approaching before he went between the tracks, and this duty he performed when he looked up track 5 to the "hump" and saw it apparently clear.

2nd. That Rule 180 by its plain reading applies only to trains upon the road. That if by custom it be made to apply also to yard operations then Boldt was at most guilty of some degree of contributory negligence in placing his foot over the rail.

3rd. That Rule 180, if it be read as applicable to yard movements, was wholly insufficient to give adequate protection in view of the fact that operating necessity frequently required employees to go between the cars under circumstances where the posting of a lookout would be impracticable. That, therefore, this rule was not for the protection of the employees, but for the protection of the company against liability. That a rule should have been promulgated which would have had the effect of preventing cars from being sent from the "hump" in onto a track containing a train made up without leaving a space between, or at least without impinging upon such train more than sufficient to make a coupling, thereby affording to the employees at least as much protection as was given to the inanimate cars and freight. That if such a rule had been promulgated and enforced the negligent act of the "rider" Bull in permitting his cut of cars to come in contact with this train with such force as to move the whole string twenty feet would not have been possible, and Boldt would be alive today.

The court disposed of defendant's motion for a direction and permitted the case to go to the jury, with the following remark (pp. 147-8):

> "I think I will allow the case to go to the jury on the point that you have emphasized —whether or not it was carelessness and

> negligence on the part of the defendant railroad company to send these cars down over that "hump" in such a way as to impinge the cars that were stationed over 500 feet away; and, whether, in the exercise of a proper degree of care, the defendant should not have instructed its employees, or promulgated a rule, that they should send them down in such a way so as not to come in contact with cars that might be stationed on the tracks."

The court thereupon submitted these two questions to the jury as matters of fact.

In the course of its instructions the court said (p. 155):

> "The specific claim of the plaintiff is that the brakeman Bull was negligent in permitting the cars to come along that gravity track without stopping them and without preventing the impact," and then recites the testimony of the witness Bull substantially as hereinbefore set forth.

The court then continues:

> "Evidence has been given by other witnesses that customarily cars are sent over this 'leader' into the yard of the defendant, and into the railroad yards of other railroad companies, *ad libitum*—that is, they are sent freely, one after another, to classify them and make up trains when already classified; they are defined as 'live tracks'—a dangerous place to work, gentlemen, and workmen

who take upon themselves occupations of that character assume the ordinary risks of the employment; they assume the risks that are incident to the particular avocation."

The foregoing and a brief reiteration of the same at fol. 492, p. 164 is the only reference in the charge to the subject of assumption of risk.

At the close of the charge defendant's counsel among other requests, obtained the following instruction:

"Mr. Adams: I except to your Honor's refusal to charge, and to the charge as made, and ask that your Honor charge the jury that the decedent assumed the obvious necessary risks of the employment in which he was engaged.

The Court: Yes, sir."

At the conclusion of all of the requests occurred the following (pp. 168-9, fols. 504-8), which plaintiff assigns as:

SPECIFICATION OF ERROR.

"Mr. Brush: Upon the subject of the assumption of risk, I ask your Honor to charge the jury that the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not include the assumption of risk incident to the negligence of the carrier's officers, agents or employees.

The Court: I decline to so charge.

Mr. Brush: Exception.

Mr. Adams: Read that request again.

The Court: Could you understand what he said, Mr. Adams?

Mr. Adams: No.

(Mr. Brush re-reads request).

The Court: Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employers contributed to the injury, or death of such employees.'

I decline to charge as requested, because this is not an action of the kind specified in Section 4.

Mr. Brush: I except."

Plaintiff also assigns as error the denial of the motion to set aside the verdict of the jury and grant a new trial upon the minutes of the court, and upon the exceptions in the case, and upon the ground that the verdict was contrary to and against the weight of evidence and contrary to law (pp. 175-6).

Plaintiff also specifies as error in her assignments of error to the Circuit Court of Appeals, the affirmance of the judgment, the refusal to reverse for the errors above specified, and the specific holdings by the Circuit Court of Appeals that plaintiff in error was not entitled to have the jury instructed in the manner quoted, and that plaintiff's intestate assumed the risk of the operation of the cars in the manner shown in the record (pp. 191, 184-5).

In denying plaintiff's motion for a new trial the Trial Court said in its opinion in reference to the request above quoted, among other things:

> "The refusal was made under a misapprehension, and if I believed that it had operated prejudicially to the plaintiff, I should assent to a new trial, but the refusal of the request, *correct in the abstract*, was not in any sense prejudicial to the plaintiff's rights, etc." (p. 26, fol. 77).

In considering the questions involved we will first demonstrate that the Trial Court was correct in this statement of the principle involved, and we will then show that the plaintiff could not escape being prejudiced by the failure of the court to instruct in the manner admitted by it to have been proper.

POINT I.

The Failure to Instruct as Requested was Error.

In seeking to maintain the correctness of the principle contended for in the request sought, we are not claiming any new or startling construction of the act in question, but have sought to have defined a little more than is found in some of the reported cases, the definition and purview of the term "ordinary risk" or "ordinary danger."

As the Trial Court indicates in its opinion, the request in question is framed in the language used in

Wright vs. Yazoo and M. V. R. R. Co.,
197 Fed., 97-8.

the substance of the holding of which is that the negligence of the carrier's officers, agents or employees are, under the Federal Employers' Liability Act, not within the purview of the term "ordinary risks." The pertinent part of the opinion is as follows:

> "Shall the courts destroy the effect of the Act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents or employees of the carrier? In view of the first section of the Act, which provides that such common carrier shall be liable in damages to its employees, resulting in whole or in part from the negligence of any of its officers, agents or employees, it is not permissible in my judgment to hold that the employee assumes the risk of his employment which arises from the negligence of the officers, agents or employees of the carrier.
>
> "As I construe the Act, the risk that the employee now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents or employees * * * * *."

Wright vs. Yazoo & M. V. R. Co., 197 Fed., 97-8.

We maintain that this is in harmony with and not in conflict with the ruling in the case of

Seaboard Air Line Railway Co. vs. Horton, 133 U. S., 503,

and that the later decisions of this court in the cases of

Chesapeake & O. Ry. Co. vs. Proffitt, 241 U. S., 462;

Chesapeake & O. Ry. Co. vs. DeAtley, 241 U. S., 310,

do not go so far as to make the proposition for which we contend bad law.

As evidence of the conception of good text writers upon this subject since the decision of the Horton case, we call the attention of the court to the fact that Mr. Thornton, in his very complete work upon the subject of the Federal Employers' Liability Act, published within the year past, writing upon the subject of assumed risk and after a full review of the Horton case and its effects upon the doctrine, under the heading "Negligence of Carrier or Fellow Servant" writes as follows:

> "The employee does not assume the risk of injury arising out of the negligence of the employer or a fellow servant.—This is the logical deduction from that provision of the Federal statute which provides that an interstate carrier by railroad shall be liable for an injury to, or death of its employee resulting in whole or in part from the negligence of any of the officers, agents or employees of the carrier."

He cites the Wright case as authority for this proposition and quotes from the decision the language hereinbefore set forth.

Thornton's Federal Employers' Liability Act, 3rd Edition, pp. 208 and 209 and cases cited.

There are also some courts of very high standing which, both before and after the decision of the Horton case, have held that under the Act, the employee does not assume the risk of the negligence of the officers, agents or employees of the carrier.

Thornton vs. Seaboard Air Line Railway Co., 98 S. C., 355;

Erie Railroad Co. vs. Jacobus, 241 Fed., 341;

Hackney vs. M. K. & T. Ry. Co., 149 Pac. Repr., 422;

Louisville & N. R. Co. vs. Fleming, 69 So. Repr., 129;

Easter vs. Virginia Ry. Co., 86 S. E. Repr. (W. Va.), 39;

Devine vs. Chicago, R. I. & P. Ry. Co., 185 Ills. App., 448;

Northern Pacific Ry. Co. vs. Maerkle, 198 Fed., 1;

Sweet vs. Chicago & N. W. R. Co., 157 Wis., 400;

Caverhill vs. Boston & Maine R. R., 77 N. H., 331.

We also maintain that the plaintiff is supported in her contention by the recent decision of this court in the case,

St. Louis & San Francisco R. R. Co. vs. Brown, 241 U. S., 223.

In this case the Trial Court had instructed the jury as follows:

> "* * * * * and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant; but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

This court said in regard to that instruction:

> "* * * * * There is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict."

But there is a further and more elementary reason why we maintain that the instruction which we sought was correct in law. As was pointed out in *Seaboard Air Line Railway Co. against Horton* 233 U. S., 503, the first section of the Act in question has two branches and, as this Court in that decision undoubtedly recognized, there was a purpose for Congress so to frame this section, which

undoubtedly was intended to cover the whole field of liability of the master to his servant. The first branch of the section, wherein liability is expressly and mandatorally placed upon the carrier for *all* the negligent acts of its officers, agents and employees, is undoubtedly intended to provide liability for negligence in respect to the non delegable acts of the employer and also the acts of fellow servants. The second branch of the section is intended to cover the whole field of negligent insufficiency in places of work, ways, works, machinery and equipment.

Thompson on Negligence (1904) Vol. IV p. 623 under the heading "A Comprehensive Statement of the doctrine of Accepting the Risk," in which he catalogues all the situations where at common law the employe has been held to assume the risk, confines the application of the doctrine to situations involving the *building, premises, machine, appliance*, or *fellow servant*. It will be observed that the second branch of Section I of this Act groups every one of these examples with the exception of that of fellow servant, and that the first branch of the Section embodies none of them with the exception of that of fellow servant.

Similarly in the survey of the field of the master's duty given in *Sherman & Redfield on Negligence*, sixth edition, Vol. I at p. 437-8 Section 183a, subdivisions 3, 4 and 5 will be found grouped in the first branch of Section I of the act and subdivisions I and II in the second branch of Section I.

We thus see that all the acts of negligence which the employee assumed at common law are grouped

together in Clause 2 of Section I of the Employers' Liability Act with the exception of that relating to fellow servants, so that to say *in the language of the Act* that the employe does not assume the risk of the negligence of the officers, agents or employees of the carrier or, as we have expressed it, that the "ordinary dangers" of his employment do not include the assumption of risk incident to the negligence of the officers, agents or employees of the carrier, is an accurate statement of the law,—notwithstanding some observations which this Court has made in general language in regard to an employe assuming the risk attributable to the employer's negligence—unless this Court is now prepared to go further than previously reported decisions and hold that Section I of the Act, with the exception of eliminating the fellow servant doctrine is merely declaratory of the common law.

It will be borne in mind that the acts of negligence of which the plaintiff complains are, first: the act of the brakeman in permitting his car to come in violent contact with the string of cars upon which decedent was working. This is the negligence of a fellow servant. Second: In failing to promulgate a rule and method of operation of cars which would have prevented the brakeman's negligence. This latter was a non delegable act and both manifestly come within the purview of the first branch of Section I.

Decedent did not assume the risk of the failure of his employer to provide a safe method of work.

Chesapeake & O. Ry. Co. vs. Proffitt 241 U. S., 462.

POINT II.

The Error was Prejudicial and Could Not Have Failed to Effect the Verdict.

In considering the consequences of error, we are governed by the following principle laid down by this court:—

> "While an appellate court will not disturb a judgment for an immaterial error, yet it should appear *beyond a doubt* that the error complained of *did not* and *could not* have prejudiced the rights of the party duly objecting.
>
> *Boston & Albany R. R. Co. vs O'Reilly* 158 U. S. 334.
>
> Vid also,
>
> *Green vs. White* 37 N. Y., 405.
>
> *People vs. Koerner* 154 N. Y., 376, bottom of page.
>
> *People vs. Helmer* 154 N. Y., 602.
>
> *Phillips vs. N. Y. C. & H. R. R. Co.* 127 N. Y., 658.
>
> *Chapman vs. Erie Railroad Co.* 55 N. Y., 579.

We shall herein undertake to demonstrate that the issues in this case, the manner in which they finally reached the jury and the other instructions given, were of such a nature that a clearer understanding of the same by the jury *absolutely required* the instruction asked for and the failure to obtain the same must have inevitably mislead the jury upon the very point upon which they most required light.

The only hypothesis upon which it could be said that the question of assumption of risk was unimportant in connection with the deliberations of the jury would be upon the assumption that decedent himself was solely responsible for his death.

Defendant's argument in regard to this was based upon the claim that Boldt was posted as a lookout by Murphy, could have seen the cut of cars coming had he looked with care; that he went outside the scope of his duties in volunteering assistance to Murphy and that Boldt was not requested to assist Murphy and that Murphy did not need his assistance.

Boldt was the conductor in charge of making up this train of fast freight under the direction of his superior officer, he was not posted as a lookout. Murphy had said nothing to him to charge him with any such responsibility, although he claimed that he considered him his lookout.

He used ordinary care in his effort to ascertain whether cars were coming, but the conditions of light, as we have seen, were wholly insufficient to have enabled him to make out these cars at the distance of 200 feet back to the end of the string upon which he was working,—or if made out, to distinguish them from the rear of the string, and least of all to determine if they were moving. And, as we have seen, undoubtedly at the time that he looked, either the cut of cars was entirely upon track 4, in which event the switch light would have shown clear, or they were crossing the entrance to track 4 and thus obscured the switch light thereon. That the operation on the knuckle required two pairs of hands. Murphy to the contrary, is evident

from the fact that Murphy had to hold his lantern, get his fingers into the knuckle to remove the broken parts, close the knuckle and slip a pin in from the bottom, all simultaneously. The foregoing facts, even if all found in defendant's favor, had bearing only upon the question of Boldt's contributory negligence, and could not alter the fact that it was the failure of the brakeman Bull to check the speed of his cars sufficiently to avoid a collision and the omission of the officers of the company to provide a rule against such collision, that was the proximate cause of Boldt's death. So that from no point of view would the evidence have warranted a finding that Boldt was solely responsible, unless it was at the same time found that Bull's act and the omission to provide the rule did not constitute negligence, or were risks assumed. So that we see that the question of assumption of risk was inextricably or inseparably interwoven with the actual issues in the case.

Now the whole trend of the evidence upon the part of the defense was to the effect that these small operations and inspections which defendant's witnesses reluctantly admitted often required men to go between the cars at times when a train was made up and preparing for removal to another track and which manifestly oftentimes required to be done under such conditions and with such dispatch as to render the posting of a lookout impracticable, were merely the ordinary hazards of a dangerous occupation. Inasmuch as the whole case turned upon the question whether Rule 180, which sought under these conditions to throw the whole burden of protection upon the men themselves, causing

them to assume the risk of *all* hazard, was a fair and sufficient measure of protection, or whether there should have been an additional rule which would have prevented, in such a case as this, cars subsequently switched upon a track from impinging upon a train already made up and undergoing the attendant trifling inspections and attentions required, which would necessitate the presence of men between the cars, and the whole of the operating details being known to the "hump" conductor who sends the cars down the gravity track, a clear and sufficient instruction as to what were and what were not the ordinary dangers of this employment was imperatively called for, to the end that the jury should not become confused between the two questions, and especially in view of the fact that the evidence constituted a highly technical recital of complex operative conditions.

It should be borne in mind at this point that when Boldt went between the cars to manipulate the coupler, which defendant, in violation of the Safety Appliance Acts, had permitted to be used in a state of disrepair, a situation which this court has repeatedly held to constitute an act of negligence *per se*,—this court cannot find that the danger which he then underwent can be classified as anything less than extraordinary danger and as such, if there were any assumption of risk in connection therewith, it must be accompanied by full knowledge and appreciation of the danger. While the evidence of the defense is to the effect that it was their custom to use these "live tracks" by placing cars in upon them from the gravity hill without reference to the safety of anything but the inani-

mate cars in freight, yet the record is silent upon the question as to whether or not Boldt, when he went upon the track, knew and appreciated the danger of cars being driven against him with violence sufficient to move his car a distance of 20 feet.

He was not obliged to exercise care to discover dangers not ordinarily incident to his employment, but which resulted from his employer's negligence.

Chesapeake & O. R. Co. vs. Proffitt, supra, and cases cited.

In lieu of such definite instructions, however, the Trial Court in the same breath that it submitted to the jury as questions of fact the sufficiency of the rules and the negligence of the brakeman Bull, points out to them (pp. 155-6) that these "live tracks" are a dangerous place to work and that workmen who take upon themselves occupations of that character assume the ordinary risks of the employment. *In other words, the court stopped just short of instructing the jury that the dangers to the men of work upon these "live tracks" were the ordinary risks of their employment and the jury might easily have so interpreted it.* The language used, while not actually erroneous was very misleading and called for a special additional instruction defining the "ordinary risks" to set the jury right upon the subject. This, at the first opportunity, plaintiff sought by the request in question wherein she endeavored to have the jury instructed that the "ordinary dangers" assumed did not include the risk incident to these negligent acts of the defendant's officers, agents or employees.

The language used therein which the Trial Court characterized in its opinion as "technical" was, nevertheless, plain and pointed directly to the acts and omissions claimed by plaintiff to be negligent and had the request been charged the jury would have had clearly before them that should they find the matters claimed by plaintiff to constitute negligence to be such in fact, then the risk of the same was not assumed. This proposition being negatived by the court's ruling, they could have found no other verdict than the one reported.

The Trial Court maintains in its opinion, p. 27, that "the instructions in their entirety were directed toward negativing the assumption of risk by the deceased or negligence of any of the defendant's officers or servants * * * * *."

As we have pointed out in our statement of facts, all of the references by the court to this subject, we submit that this is not a fair characterization of the charge as a whole.

POINT III.

The Judgment Should be Reversed and the Cause Remanded with Costs to the Plaintiff in Error.

FRANK GIBBONS,
HENRY W. BRUSH,
C. W. DILLE,
Of Counsel.

(25,000)

ME COURT OF THE UNITED STATES

October Term, 1916

No. [redacted]02

[redacted]

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Supreme Court of the United States.

CAROLINE BOLDT, as Administratrix of the Goods, Chattels and Credits which were of EDWARD J. BOLDT, deceased,
Plaintiff-in-Error,
(Plaintiff below)

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant-in-Error.
(Defendant below)

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

It being our judgment that certain parts of the record, and the law applicable thereto, are insufficiently emphasized in our brief in chief, we desire to file the following supplemental brief.

As we called to the attention of the Court at pp. 5 and 6 of our brief in chief, when Murphy, the assistant yardmaster, walked over from track 10 to track 4 and found the four rear cars of the train on track 4 separated from the rest, he signalled

the engineer to back up and couple on, which being done, he ascertained that the coupling on the front of the first of the four cars failed to make. He testified upon this subject at pp. 42, 43 and 44 as follows:

> "When I ascertained that that space was there I gave the engineer the signal to back up and couple on to those cars, and the coupling failed to 'make.' They were automatic couplers. I ascertained that both knuckles closed. The drawheads were not caught properly when I picked them up. When the cars came together the knuckles didn't meet so that they didn't 'make.' I saw it, I looked in there and saw it with my lamp. I held my lamp there and saw that the knuckles didn't meet. I then gave the signal to the engineer to go ahead and I opened the knuckle. When I say I signalled to go ahead I mean to pull the 15 cars away from the other 4 and make an opening of about 10 feet. I attempted to make that coupling more than once by backing up and making an effort to couple. It failed to make twice. The last time I tried to make the coupling I noticed the knuckle didn't close—they made but when I swung the engineer up the cars came to a stop and the cars parted and I discovered that the coupling would not 'make.' I mean by 'swinging the engineer up' that I gave him the signal to stop, and then I saw that the knuckles hadn't closed. When I swung him up—gave him the signal to stop, he stopped and the cars parted and I saw that the knuckle was still open; I

didn't know how much space there was there when I gave the signal to stop—then I gave him the signal to go ahead so that I could step in there and determine and see if the knuckle could be closed. He took the signal and went ahead about 20 feet, so that there was a good space to step in between the cars, a space of about twenty feet between the end of this string and the first of those detached cars. I then stepped into that space to determine if the knuckle could be closed. Just at the time I stepped in, Boldt arrived—he wasn't there previously to that time—he was coming down the track. He hadn't followed me over there, he was just coming down the track at the time. Just as I stepped in there, he arrived. I said to him, 'The knuckle—the lug of the knuckle is broken.' When the knuckle was open I looked in there and saw that it was broken, so that I know the knuckle was broken."

He then goes on to describe the appearance of the knuckle, comparing it to a latch with the tongue broken. He repeats his description of the efforts to couple, on cross examination at p. 55, and demonstrates the mechanism of the coupler, illustrating with a model at pp. 68-71. The foregoing, except the mechanical testimony at pp. 68-71, was developed without objection, and by both sides. In the course of the technical examination in regard to the coupler it developed at pp. 65-7, 70-73, that the Trial Court was of the opinion that plaintiff's complaint was not sufficiently broad so that negligence might be predicated upon the damaged

coupler. The allegation of the complaint covering this point is found at pp. 6 and 7, fols. 18 and 19, and is as follows:

> "That said assistant yardmaster and your plaintiff's intestate were standing on the ground at the rear of said train, at the right thereof; said assistant yardmaster signalled to said engineer to back up and couple on to said last six cars, which being done, it was discovered that said coupling did not 'make.' That upon said coupling failing the second time, said assistant yardmaster signalled said engineer to draw off said train a space of about 20 to 30 feet, which being done, said assistant yardmaster thereupon went into the space between said detached cars and the train, for the purpose of examining the drawhead upon the first detached car, and pulling out the coupler thereof."

To meet this ruling, with the foregoing proofs all in without objection, and developed by both sides, plaintiff sought, upon closing her side of the case, to amend her complaint to conform to the facts proven, using in said motion the language of the Safety Appliance Act, which motion was denied with an exception to the plaintiff. For the convenience of the Court we here set out *in extenso* the colloquy between Court and counsel upon this motion at pp. 91-95, and the Court's adverse ruling.

> "Mr. Brush: I am making the observation in connection with Murphy's testimony that all these facts have been developed from

the testimony of those whom you might say, is the defendant himself—presumably his knowledge of all the facts was open to the officers of the defendant and to the attorneys of the defendant; we had supposed that our pleading was sufficiently broad to cover this question of defective coupling and thereby to bring us within the purview of section one of the act which provides a cause of action where the accident happens in whole or in part by reason of a defect or insufficiency in the care of their appliances or equipment; as I say all the facts are out —there cannot be any surprise because the defendant must have known all these facts, —and I move now to amend the complaint to conform to the facts proven in the two prayers,—in folio 9, where it reads that the assistant yardmaster went into the space between the detached cars for the purpose of an examination of the drawhead and pulling out the coupler thereof,—and add 'the same having been found to be defective, the knuckle thereof having been found to be broken.'

We further move to amend the complaint to conform to the facts proven in the end of folio 3, line 7,—so that the same shall read: 'And the plaintiff further alleges that said defendant was negligent in hauling or permitting to be hauled or used on its line a car used in interstate traffic not equipped with couplers coupling automatically by impact by reason of a defective and broken knuckle.'

The Court: Do you consent to that, Mr. Adams?

Mr. Adams: I object to the amendment on the ground of surprise; I assume this amendment is for the purpose and idea that it should be made for the purpose of conforming to their proof and I object to it on the ground that it is not necessary for that purpose at this time.

Mr. Brush: It is only necessary in view of the observation that your Honor made a few minutes ago that you understood from the pleadings that we did not make the claim by reason of a defective coupler; and so far as the question of surprise is concerned,—surprise cannot be predicated on misunderstanding of counsel of the precise point for which we contend, for all these facts were in his possession; if we had elicited facts that he did not know about the situation might be different.

The Court: Have you any more proof?

Mr. Brush: We are prepared to rest this case.

Mr. Adams: I object to it then on the ground that under the proof it is not necessary.

The Court: I do not understand from anything shown so far that this decedent was called upon to go in between the cars, —quite to the contrary; the affirmative evidence shows it was the duty of yardmaster to go in and see about that knuckle and that he asked this man to look out and see if any cars were coming and that he did

that and that he adhered to the rule; what Boldt did was voluntarily done, and about the last answer of Murphy's was that he didn't ask Boldt to come in between the cars.

Mr. Brush: That is only negative proof on the subject and it cannot be maintained as a matter of law; it is for the jury to say whether or not Boldt was in between the cars in the performance of his duty; we maintain that he was in there in the performance of his duty aiding and assisting his superior there.

The Court: He was not asked to come in there to aid and assist him.

Mr. Brush: That don't make any difference; he was there when this work was being done; he was there in the performance of his duty when he assisted in doing it; when he assisted in doing it—

The Court: Not according to the testimony of Murphy,—Murphy said that he asked him to stand there and look out and give him notice of approaching cars.

Mr. Brush: Mr. Adams, in his opening, stated plainly that Mr. Murphy told him to stay there but Murphy didn't testify to any such thing.

Mr. Adams: He certainly did testify to that.

The Court: I will deny the motion and give you the exception.

Mr. Brush: Exception."

In ruling upon the points which should be submitted to the jury, the Court ignored the effect upon the case of the damaged coupler, and eliminated the same (pp. 147-8).

In the course of its instructions to the jury the Court said at p. 152:

> "The measure of duty which the defendant railroad company owed to the decedent, therefore, was 'ordinary care'; the measure of duty which the decedent owed his employer was 'ordinary care'; there was a reciprocal duty devolving upon each to use such care to the end that no accident might occur; to the end that no injury might be sustained."

And later at p. 162:

> "The Employers' Liability Act, Section 3, substantially provides that in all actions hereinafter brought against common carriers engaged in interstate commerce, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, however, that no such employee who may be injured or killed shall be held to be guilty of contributory negligence in any case where a violation by such common carrier of any statute enacted for the safety of employees

> contributed to the injury or death of said employee. *This latter provision you need given any attention to, because it is foreign to this case.*"

And at p. 169, in disposing of the request which we have in our brief in chief specified as error, the Court said:

> "I decline to charge as requested, because this is not an action of the kind specified in Section 4.
>
> Mr. Brush: I except."

Upon the foregoing we make the following additional

SPECIFICATIONS OF ERROR.

1st. The Court erred in holding that the complaint was not sufficiently broad to predicate negligence upon the damaged coupler, and in denying plaintiff's motion to conform her pleading to the facts proved in respect thereto.

2nd. The Court erred in its instructions to the jury as quoted from pp. 152 and 162.

3rd. The Court erred in holding, as it did flatly at p. 169 that "this is not an action of the kind specified in Section 4" (of the Employers' Liability Act).

The first and third specifications are raised by the second assignment of error (pp. 175-6, p. 191) as follows:

> "In denying the motion of counsel for plaintiff-in-error, made after the verdict of

the jury had been rendered, to set aside the verdict of the jury and grant a new trial upon the minutes of the Court, and upon the exceptions in the case—."

The second specification should be noticed as plain error in connection with the consideration of the other two.

These matters were all sufficiently before the Courts below under the foregoing assignments of error, but were not discussed in the opinions. Should this Court, however, be inclined to hold that they are insufficiently specified or assigned, we earnestly urge that substantial justice in this case requires that they be noticed as "plain error," under paragraph 4 of Rule 21.

POINTS OF LAW.

We will discuss the questions raised by the specifications of error together.

The facts proven show a very plain violation of the Safety Appliance Acts relative to impact couplers. Not only did the coupler fail twice to couple by impact, but the knuckle thereof was broken. The car was not "dead," but was "being used" within the meaning of the Act as defined in

Delk vs. St. Louis &c. R. Co., 220 U. S., 580, and

Erie R. R. Co. vs. Russell, 183 Fed., 722;

and the case at bar is a much stronger one than these cases, where the cars were temporarily lying on switch tracks, for in this case the car was a part

of a train actually made up in station order for Pennsylvania points, and ready for transit upon a railway concededly a highway of interstate commerce (pp. 38-43), thus bringing the case within the rule of

> Southern Railway Co. vs. United States, 222 U. S., 20, 26; and
> Texas & Pacific Ry. vs. Rigsby, 241 U. S., 33, 37.

Thus plaintiffs intestate was entitled to the protection of the Safety Appliance Act unless the assistance which he was giving to his superior in manipulating the coupler was that of a mere volunteer, and wholly outside the scope of his employment. The Trial Court conceived that idea at one stage of the case, based upon a misconception of the evidence, to wit, that Murphy had given a specific direction to Boldt to stand outside the tracks and give him notice of approaching cars (pp. 94-5), whereas Murphy's only remark upon the subject was his question "How does she look?" Boldt had the primary responsibility for the readiness of this train, he being the conductor in charge of making it up, and, as expedition plainly required that this operation upon the coupler be performed with the utmost despatch, he would have been remiss in his duty had he permitted his superior to struggle with it alone, unless he had received specific instructions to remain outside as a guard. He was acting within the scope of his employment, even if he mistook the necessity for his action. This theory, that Boldt was a volunteer, which logically would have led to a dismissal of the complaint, was abandoned by the Court in submitting the case to the jury.

The damaged coupler was at least one of the proximate or concurring causes of the accident, since if the coupler had been in proper order, plaintiff's intestate would not have been in this position of danger.

St. Louis M. B. T. Ry. Co. vs. Schuerman, 237 Fed., 1.

Grand Trunk Westren R. Co. vs. Lindsay, 233 U. S., 42.

Even if the damaged coupler did not bear such relation to the accident as to enable plaintiff to plead the same as a proximate cause thereof—if it were only incidental to other negligent acts which directly caused the death, the coupler being merely *contributory* thereto, plaintiff was entitled to have the Safety Appliance Act applied in her behalf, and to have the benefit in this case of Sections 3 and 4 of the Employers' Liability Act. The language of these sections is that they shall be applied "in any case where the violation by such common carrier of any statute enacted for the safety of employees *contributed* to the injury or death of such employee," and this brings us to the subject of the pleading, and the effort at amendment thereof. The allegation of the pleading was (p. 7, fol. 19) that the coupler twice successively failed to couple by impact, thus necessitating the going between the cars for the examination thereof. This allegation, when supported by appropriate proof, required the Court to submit the case to the jury under the provisions of the Safety Appliance Act and Sections 3 and 4 of the Employers' Liability Act, since the

failure of a coupler to work at any time brings a case within these provisions.

Chic. R. I. & P. R. Co. vs. Brown, 229 U. S., 317, and cases cited.

Nor was it necessary to effect this result, that the failure of the coupler should have been plead specifically as an act of negligence, since liability for violations of this Act are not necessarily based upon negligence, but an absolute liability exists to keep the coupler in repair. As Mr. Justice Pitney has well said:

> "It is argued that in actions based upon the Employers' Liability Act the defendant cannot be held liable without evidence of negligence, Seaboard Air Line vs. Horton, 233 U. S., 492, 501, being cited. But in that case, as the opinion shows (p. 507), there was no question of a violation of the Safety Appliance Act; and in what was said (p. 501) respecting the necessity of showing negligence, reference was had to causes of action independent of that Act. The Employers' Liability Act, as its 4th section very clearly shows, recognizes that rights of action may arise out of the violation of the Safety Appliance Act. As was stated in Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S., 33, 39,—'A disregard of the command of the statute (Safety Appliance Act) is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default

> is implied.' If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S., 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to 'any defect or insufficiency, due to its negligence, in its care, engines, appliances,' &c., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*."
>
> San Antonio & Arkansas Pass Ry. Co. vs. Wagner, 241 U. S., 485.

It was, however, a gross abuse of discretion not to permit the issue to have been sharpened by amending the pleading as sought by plaintiff. The proof had been developed by both sides, from a witness then in the employ of the defendant (pp. 35-6), and whose knowledge of all of the facts may be presumed to have been that of the defendant, and there was so reasonable ground for a claim of surprise. The ultimate effect of the granting of this motion would, of course, have been the submission of the case to the jury upon the proper theory, and for this reason the exception to the denial thereof raised reversible error. However, as we have seen, the pleading as it is, and the proof supporting it, absolutely required the case to be submitted to the jury under the Safety Appliance Act, and the Court was not absolved from that duty by exercising its discretion in refusing amendment of the pleading. Therefore the parts of the charge which we have quoted, in which the reciprocal du-

ties existing between decedent and the railroad company were defined as being that of "ordinary care," and the express elimination from the consideration of the jury of Sections 3 and 4 of the Employers' Liability Act, was plainly erroneous. In the Wagner case, *supra*, the Trial Court instructed the jury that "if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars, and by reason of this and as a proximate result of it plaintiff received his injuries, the verdict should be in his favor, otherwise in favor of the defendant, and that the burden of proof was upon plaintiff to establish his case by a preponderance of evidence." This is substantially the charge which should have been delivered in this case. If it be objected that this erroneous charge was not the subject of exception, we point to the fact that in denying plaintiff's request to charge on p. 169, the Court flatly held that "this is not an action of the kind specified in Section 4" (of the Employers' Liability Act). To this the plaintiff had an exception, and thus the whole question is raised.

It should be borne in mind by this Court, that at the time this case was tried, and at the time it was presented to the Circuit Court of Appeals, neither Court nor counsel had the benefit of the recent clear expositions by this Court of the Safety Appliance Acts, and their co-relation to the Employers' Liability Act. Had the decision of this Court in the Wagner case, *supra*, been before the Trial Court, there could have been but one result, a direction for an assessment of damages in favor

of the plaintiff. The plaintiff should not be prejudiced by this situation. She has not had her chance. It should be granted.

HENRY W. BRUSH,
FRANK GIBBONS,
C. W. DILLE,
RUFUS S. DAY,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1917.

No. 62.

CAROLINE BOLDT, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF EDWARD J. BOLDT, DECEASED, *Plaintiff in Error,*
(Plaintiff below).

vs.

PENNSYLVANIA RAILROAD COMPANY, *Defendant in Error,*
(Defendant below).

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In reply to the brief of the defendant in error we contend that the main question in this case is whether the trial court erred in construing Sections Three and Four of the Federal Employers' Liability Act as not applicable to the case at bar, and thereby excluding the plaintiff from its benefits and protection.

Section 3 of the Act provides:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the

provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided: That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (35 Stat., 66.)

Section Four of the Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. L. 65, reads:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The plaintiff objected to the erroneous construction of the provisions of Sections 3 and 4 of the Employers' Liability Act in that the trial court ruled that this case was not of the character of cases coming under these Sections; the rights claimed by the plaintiff under these Sections were brought clearly to the mind of the court by plaintiff claiming that this case came within the Sections, and moving the court to be allowed to amend the complaint so as to allege more specifically that plaintiff's case is based on the ground of a defective appliance. This motion to amend the complaint was overruled, and exception taken.

The counsel for the Railroad Company state that it was not claimed at the trial that the death resulted from a de-

fective appliance of the Railroad Company in violation of the Sections of the Act referred to; it is only necessary to refer to the record to refute counsel's statement.

Record, page 92.

"We had supposed that our pleading was sufficiently broad to cover this question of defective coupling and thereby to bring us within the purview of section one of the Act which provides a cause of action where the accident happens in whole or in part by reason of a defect or insufficiency in the care of their appliances or equipment * * * and I move now to amend the complaint to conform to the facts proven in the two prayers—in folio 9, where it reads that the assistant yardmaster went into the space between the detached cars for the purpose of an examination of the drawhead and pulling out the coupler thereof—and add "the same having been found to have been defective, the knuckle thereof having been found to have been broken. We further move to amend the complaint to conform to the facts proven in the end of folio 3 line 7,—so that the same shall read: "And the plaintiff further alleges that said defendant was negligent in hauling or permitting to be hauled, or used on its line a car in interstate traffic not equipped with couplers coupling automatically by impact by reason of a defective or broken knuckle."

The Court: "Do you consent to that Mr. Adams?"

Mr. Adams: "I object to the amendment on the ground of surprise; I assume that this amendment is for the purpose and idea that it should be made for the purpose to conforming to their proof and I object to it on the ground that it is not necessary for that purpose at this time."

Mr. Brush: "It is only necessary in view of the observation that your Honor made a few minutes ago that you understood from the pleadings that we did not make the claim by reason of the defective coupler * * *

The Court: "I will deny the motion and give you an exception.

Mr. Brush: "Exception."

Counsel for the Railroad Company earnestly urge that the case at bar comes within the so-called "Two Court Rule," and to establish this contention they cite a long list of authorities headed by Chicago Junction Railway Co., v. King, 222 U. S., 222; 169 Fed., 372, wherein the case is decided in favor of the plaintiff. Counsel evidently make this case the keystone of their brief, we are hopeful that it may be considered so by this honorable court. This court disposed of the King Case wholly and solely upon questions of practice and procedure; and it is very readily distinguishable from the case at bar. In that case the court held that although there may be jurisdiction because the cause of action rested on a statute of the United States, where none of the contentions directly invoke the interpretation of the statute but merely the question whether, on the evidence, there was a right of recovery, the case is of the character of cases in which it was the purpose of the Judicial Act of 1891 to make the judgment of the Circuit Court of Appeals final, and that this court will only examine the record to see if plain error has been committed; and that if not apparent it will affirm the judgment. In the present case, as we have clearly established from the quotations from the record hereinbefore given, the very idea of our motion to amend which was so erroneously overruled was to more specifically base our case upon the defective appliance than was done in our original complaint. It would therefore seem quite clear that "The Two Court Rule," which defendant in error so confidently rely upon can find little comfort here, because it is totally inapplicable to our present situation.

To further show that the Statute was construed we quote from the Court's charge to the jury, Record, page 162, wherein the court said:

"The Employers' Liability Act, Section 3, substantially provides that in all actions hereinafter brought against

common carriers engaged in interstate commerce, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, *Provided, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of said employee. This latter provision you need not give any attention to, because it is foreign to this case.*"

We quote from the court's language, Record, page 169:

The Court: "Under the Employers' Liability Act the employee simply assumes the risk of employment. Section Four reads: 'Such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

I decline to charge as requested, because this is not an action of the kind specified in Section 4."

Mr. Brush: "I except."

Regardless of opposing counsel's statement to the contrary it is quite evident that the court construed both Sections Three and Four of the Employers' Liability Act as not being applicable to the present case.

Reverting to the King Case, supra, upon which counsel for the Railroad Company seem to so strongly rely. A perusal of the language of Judge Baker, delivering the opinion of the Circuit Court of Appeals, would seem to indicate that that case is one upon which we might rely with somewhat greater assurance than can the counsel for the railroad.

Judge Baker said:

"There was evidence to support a finding that it was within the scope of plaintiff's duty to endeavor to repair the coupler so that the train might be put together and the crew proceed with their work of distributing the cars. According to this view, plaintiff's act in substituting a new knuckle for the broken one in preparation for a coupling by impact was quite similar to Voelkers' (in Chicago, Milwaukee & St. P. Rd. Co. v. Voelker, 129 Fed., 522), in adjusting a defective coupler so that it would couple automatically. *But we find nothing in the Statute which limits the classes of persons to whom the carrier shall be responsible for damages that result directly and immediately from its illegal doings.*
* * * So plaintiff's knowledge of the physical conditions can not be charged against him in determining the quality of his conduct in going and being between the cars. And since he could not be crushed between quiescent cars, his knowledge that at every instant of time there was a possibility of the cars being moved by the act or direction of other servants is likewise irrelevant."

IT WAS NOT EVEN NECESSARY TO INVOKE FORMALLY THE PROVISIONS OF THE SECTIONS OF THE EMPLOYERS' LIABILITY ACT, 3 AND 4, IF PLAINTIFF'S CASE IN REALITY COMES WITHIN THEM.

It was not even necessary to expressly allege in the plaintiff's complaint that the defendant had violated Sections Three and Four of the Federal Employers' Liability Act. Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 48, 49, 50, is a case which, we believe, governs the case at bar as to the vital questions herein involved. The opinion of this Court was delivered by the present Chief Justice; and we quote from it at length in full confidence that this case by itself clearly shows that the trial court plainly erred, and charged the jury upon a theory of law quite ill founded.

The Chief Justice said:

"In the trial court it is insisted that the operation and effect of the Employers' Liability Act upon the rights of the parties was not involved because that act was not in express terms referred to in the pleadings or pressed at the trial and was hence not considered by the court in acting upon the requested charge and therefore it is urged that it was error in the reviewing court to test the correctness of the ruling of the trial court by the provisions of the Employers' Liability Act instead of confining the subject exclusively to the Safety Appliance Law and the rules of the common law regarding negligence. But the want of foundation for this contention becomes apparent when it it considered that in the complaint and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the Employers' Liability Act. It is true that to avoid the irresistible consequences arising from this situation it is insisted in argument that as no express claim was made under the Employers' Liability Act, therefore there was no right of the plaintiff to avail himself of the benefits of its provisions, or in the court to apply them in the case before it. But this simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness considered as an original proposition the contention is not open as it was expressly foreclosed in Seaboard Air Line R. Co. v. Duvall, 225 U. S. 447, 482.

"Coming to consider the proposition that although the case be governed by the Employers' Liability Act error was nevertheless committed in sustaining the action of the trial court in refusing to give the requested instruction, we think that even if for the sake of the argument it be assumed that the proof brought the case within the principle of comparative negligence established by the Employers' Liability Act, the correctness of the ruling of the court below is clearly made manifest by the reason given by the court for

its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in ging in between the cars, in the view most favorable to the railroad, the case was one of concurring negligence, that is, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going in between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence since the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion in which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee (Norfolk & Western Ry. Co. v. Earnest, 229 U. S., 114, 122), neverthless under the terms of a proviso to the section contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees. In that contingency the statute abolishes the defense of contributory negligence. The proviso reads, Act of April 22, 1908, c. 149, Sec. 3, 35 Stat. 65, 66:

> "Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

PLAINTIFF WAS KILLED WHILE ENGAGED IN THE PERFORMANCE OF HIS REGULAR DUTIES WHILE REPAIRING A DEFECTIVE COUPLER ON AN INTERSTATE CAR, AND THEREFORE HIS ADMINISTRATRIX IS ENTITLED TO THE FULL PROTECTION OF SECTIONS THREE AND FOUR OF THE EMPLOYERS' LIABILITY ACT, THE PROVISIONS OF WHICH ABROGATE THE DEFENSES OF CONTRIBUTORY NEGLIGENCE AND ASSUMED RISK.

As hereinbefore stated, the trial court ruled that plaintiff's interstate was not entitled to the benefits of Sections 3 and 4 of the Employers' Liability Act, and on the ground that this is not a case of the character of those coming within the provisions of said sections. Although the court failed to give any reason why this case did not come within the provisions and protection of Sections 3 and 4, yet the court strongly inferred that it was because it took the view that plaintiff's intestate was not at the moment of his death engaged in the performance of a duty within the scope of his employment. Yet the evidence showed, without contradiction, that Boldt was in charge of the very section of the train containing the car with the defective coupler, which he was assisting his superior to repair, if possible. He was in there between those cars with the consent of his superior, silent if not expressed; his aid was accepted by his superior, and we believe he needed it. In Seaboard Air Line v. Duvall, 225 U. S., 477, 485, this court said:

"But the plaintiff in error now urges that it was entitled to have construed that provision of the Employers' Liability Act which requires that a plaintiff to recover under it must have been injured 'while he was employed by such carrier in such commerce," and that the requests denied were applicable to the evidence which tended to show that he had ceased to be such an employee, because he was not, at the moment of the injury, engaged in the conduct of interstate commerce, or at the place where his duty required

him to be. That the plaintiff was in the general employment of an interstate road, and at the time was the baggage master of one of its trains running from one State to another was shown by all the evidence. If his employment had been terminated, it was solely because he had momentarily gone into the adjacent express car. If he was injured while employed about something which it was his duty to do, it was solely due to the fact that he had gone into that car under the direction *or with the consent* of his conductor."

We believe that it quite clearly appears that Boldt when killed was employed in assisting his superior in repairing a defective coupler on an interstate car; that while so doing he was in between those cars with the consent of the superior whom he was aiding.

Conclusion.

From a consideration of the whole case we believe that it has been fully established:

1. That the defendant is a railroad company engaged in interstate commerce.

2. That the car in question had upon it a coupler which was defective, and which, therefore, did not comply with the Act of Congress.

3. That at the time the plaintiff was killed the defendant's car was being used in interstate commerce.

4. That plaintiff was killed while a servant of the defendant company, and in the performance of his duty aiding a superior employee to repair a defective coupler, with such superior's consent.

5. That the defective coupler was a contributing cause, if not the proximate cause of plaintiff's intestate's death.

6. That regardless of the construction of the trial Judge to the contrary, this case does come within the benefits and protection afforded by Sections 3 and 4 of the Federal Em-

ployers' Liability Act abrogating the defenses of assumed risk and contributory negligence; and that the court's charge to the jury was surcharged with plain and palpable error.

7. That the court plainly erred in overruling the motion to amend the complaint.

8. That plain and palpable errors were committed by the trial court, and if they were not properly assigned, they nevertheless should be noted by this court in order that they may be remedied, and that the plaintiff herein may ultimately receive the benefit of a judgment to which she is so clearly entitled.

Respectfully submitted,

HENRY W. BRUSH,
FRANK GIBBONS,
C. W. DILLE,
RUFUS S. DAY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 62.

CAROLINE BOLDT, ADMINISTRATRIX OF EDWARD J. BOLDT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

GENERAL STATEMENT.

This is an action under the Employers' Liability Act of 1908, to recover damages flowing from the alleged negligent killing of plaintiff's intestate, Edward J. Boldt, on October 11, 1911.

The case was tried to a jury in the United States District Court for the Western District of New York before Hazel, J., December 13, 1912. The jury, upon consideration of all of the facts and under instructions from the court which clearly defined the issues involved and the law applicable thereto, found its "verdict for the defendant of no cause of action" (R., 20, 149, 170). Judgment pursuant to such verdict was duly entered (R., 21) and upon appeal was affirmed by the United States Circuit Court of Appeals for the Second Circuit November 20, 1914. (For opinion, see Record, pp. 184-185; also 218 Federal Reporter, 367.)

To review the judgment of the Circuit Court of Appeals this writ of error has been brought.

It is said in the main brief for plaintiff in error (p. 2) that "*the only question for review by this court relates to the nature and classification of the risks assumed by plaintiff's intestate*" (*italics supplied*) and the assignments of error filed in the Court of Appeals and in this court (R., 174-190) are based on the refusal of the learned trial judge to grant a specific instruction (R., 168, 169) regarding the defense of assumption of risk, in the form in which requested by plaintiff in error, after the trial judge, in his oral charge, had fully instructed the jury in the light of the issues of fact and law raised in the case, including that of assumption of risk (R., 149, 156, *et seq.*).

The case does not present any novel principle of law nor involve in any aspect the meaning or construction of the language of the Employers' Liability Act.

STATEMENT OF FACTS.

The accident occurred in the defendant's classification or "gravity" yard at Buffalo, New York, which is used in classifying freight cars and making up freight trains. All of the tracks in this yard open from a single track like the sticks of a fan and connect with "lead" or "ladder" tracks; all tracks are known as "live" tracks (R., 54). All of the tracks in the gravity yard are in constant use for the making up of trains and all cars standing on any thereof are liable to be moved at any moment without notice. The "lead" or "ladder" tracks connect with the "hump." Trains of cars are pushed up this "hump," the cars cut loose, and allowed to run by gravity down the ladder track to the particular tracks upon which it is desired to place them. It has long been the practice of defendant in error and of other railroad companies in operating such classification yards to permit cars to run down the "hump" and impinge standing cars without warning (R., 64.) Employees are supposed to be always on the lookout for cars or strings of cars which coming down from the hump may strike cars standing upon the tracks below (Rec., 96-98, 140). No repairs are ever made on these tracks except by special car repair men, who

protect themselves by locking the switch leading to the track upon which they are working and by putting up a blue flag in the daytime and a blue light at night. Whenever heavy repairs are necessary the cars are taken to the shops (R., 58, 64). The employees are forbidden to go underneath or between the cars in this yard for any purpose without protecting themselves from the possibility of cars coming upon them unexpectedly, and the defendant had in force at the time of the accident yard rule known as No. 180, which read:

> "Employees must not go between or "under cars in a train until some other "member of the crew is made aware of the "fact, and the latter takes the necessary "precautions to prevent the train from "being moved while the employee is be- "tween or under the cars" (R., 76).

Boldt, the deceased, and his fellow workmen, in addition, had received instructions from the train master never to go underneath or between cars unless some member of the crew was in position as a "lookout" to prevent cars from being moved, or the man in charge of the gravity movement in the "hump" had been notified (R., 139).

Plaintiff's intestate, Boldt, was an experienced railroad man, in the employ of the defendant for about ten years, during which he had worked for several years as a yard conductor in this very yard (R., 52). On the evening of the accident he was working with Assistant Yard Master Murphy,

who had gone between two cars standing upon one of the yard tracks for the purpose of adjusting the couplers so as to have the car cut out for repairs. Boldt remained standing on the other side of the cars (41) to keep a lookout for Murphy in accordance with the company's rule. Murphy asked Boldt, "How does she look" (meaning to inquire whether any cars were coming on the track), and Boldt, lighting a cigarette, replied, "She looks all right, go ahead." Murphy then stepped between the cars, caught hold of the knuckle of the coupler and was adjusting it when Boldt said, "Wait, I will hold the pin," and, without being requested to do so by Murphy, he stepped between the strings of cars (R., 45, 46, 59, 60, 61, 90). At the time of stepping between the cars Boldt had a clear view all the way to the "hump," a distance of over five hundred feet, and was facing in that direction (R., 49, 59, 61, 65). As he stepped over the rail a string of four cars struck the rear of the string on which he and Murphy were working (R., 47, 48, 88). Murphy was thrown between the rails but escaped injury; Boldt was run over and killed (R., 49, 50, 61).

ARGUMENT AND AUTHORITIES.

It was not claimed or proved at the trial that there was any negligence in the construction of the yard (R., 104, 105), or that the accident resulted from a defective appliance (R., 66, 72, 93). The only acts of negligence relied upon related to the practice of allowing cars to run down the "hump" against standing cars without promulgating a general rule or issuing special instructions to safeguard such operation (R., 147, 148, 155, 157).

All issues as to negligence, contributory negligence and assumption of risks were submitted to the jury, under instructions, which in view of the opinions of this court in

Seaboard Air Line *vs.* Horton, 233 U. S., 492.

Southern Ry. Co. *vs.* Crockett, 234 U. S., 725.

Cheasapeake & Ohio Ry. Co. *vs.* Proffitt, 241, U. S., 462.

Jacobs *vs.* Southern Ry. Co., 241 U. S., 229.

were even more favorable to plaintiff than the law required.

In the foregoing and other cases this court held that the defense of assumed risks may be an absolute bar to the action, even where it arises out of the master's breach of duty, if the risk be obvious

or hidden, but known to the employee, who continues in the employment without objection or without receiving and relying upon assurances that the defective appliances or dangerous situation will be remedied. The learned trial judge in his oral charge told the jury that workmen engaged in making up trains in classification yards, such as that in which decedent was employed at the time of the accident, assumed the ordinary risks of such employment—the risks incident to the particular avocation (R., 155, 156), but refused to instruct in the form requested by the defendant that such workman assumed such risks as were obvious, although resulting from the employer's negligence in the manner of operating the yard or in the promulgation of proper rules (R., 168). The court also declined to give the following specific instruction requested by counsel for the plaintiff below, assigned as error here, because foreign to the issues raised in the case (R., 168, 169).

> "Mr. Brush: Upon the subject of the assumption of risk, I ask your honor to charge the jury that the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees.
>
> "The Court: I decline to so charge.
>
> "Mr. Brush: Exception.
>
> "Mr. Adams: Read that request again.

"(Mr. Brush rereads request.)

"The Court: Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.'

"I decline to charge as requested, because this is not an action of the kind specified in section 4.

"Mr. Brush: I except" (R., 168, 169).

The instruction requested by the plaintiff below ignored the limitations of section 4 of the Employers' Liability Act and if given as requested would have eliminated the entire defense of assumption of risk preserved in the statute as construed by the decisions of this court. The Act strikes down the defense of assumption of risk only where the master has violated a statute enacted for the safety of his employees (Horton and Jacobs cases, *supra*). The instruction as requested would deny this defense in any case resulting from the negligence of the master's officers, agents or employees whether a safety statute had been violated or not and whether the risk was obvious and well known to the employee or otherwise.

In the instant case the practice of dropping cars over the "hump" so as to strike against cars stand-

ing on the yard tracks below, was customary, notorious, and obvious (R., 63, 64). The plaintiff's intestate immediately preceding the accident had a clear view of the then approaching cars during a run of over five hundred feet (R., 49); he was not called upon nor required to perform any duty under or between the standing cars, but on the contrary had been stationed as a "lookout" to protect his fellow workman, Murphy. In the teeth of the specific rule (No. 180) of the company and of the positive instructions which had been given him, he voluntarily left his position as "lookout" and stepped between the standing cars, sacrificing his own life and endangering the safety of Murphy (R., 45, 48, 94). This court in Great Northern Ry. *vs.* Wiles (240 U. S., 448) has clearly and forcibly pointed out the consequences to the company, its employees and the public of such a violation of rules devised to meet emergencies and promote safety in railroad operation.

As the trial court and the court of appeals held, it was not claimed or shown that there had been any violation of any statute which would negative or destroy the defense of assumption of risk under section 4 of the Employers' Liability Act (R., 66, 72, 93, 84, 162). The negligence alleged and sought to be proved was negligence in the customary manner of classifying the cars and operating the yard, and in failing to promulgate and enforce proper rules to safeguard such operations. If the man-

ner of operating the yard was dangerous, then, as the court of appeals pointed out, such manner was obvious and well known to the decedent. The lack of protection by rule was completely met by the proof existence and enforcement of General Rule No. 180 and special instructions communicated to employees. The trial court instead of granting the motion of the defendant and directing a verdict in its favor, submitted all such questions as well as that of assumption of risk to the jury as facts for it determination (R., 147, 148), carefully instructing that if the jury found the defendant had not been negligent their verdict should be "No cause of action" (R., 161); but if they found the defendant to have been negligent in any of the particulars, and that the deceased also had been guilty of contributory negligence, such contributory negligence would not be a bar but should be considered only in diminution of damages (R., 162, 163). The charge, taken as a whole, seems unexceptionable.

The jury having found that there was "no cause of action," and two courts having concurred in judgments based thereon, it is respectfully submitted that the case comes within the so-called "Two Court Rule," and upon the authority of

Chicago Junction Ry. Co. *vs.* King, 222 U. S., 222.

Chicago R., &c., & Pac. Ry. Co. *vs.* Brown, 229 U. S., 317.

Texas & Pac. Ry. Co. *vs.* R. R. Comrs. of La., 232 U. S., 338, 339.

Grand Trunk Western Ry. Co. *vs.* Lindsay, 233 U. S., 42, 50.

Southern Ry. Co. *vs.* Gadd, 233 U. S., 572, 576, *et seq.*

Atlantic Transport Co. *vs.* Imbrovek, 234 U. S., 52, 63.

Cin. Northern Ry. Co. *vs.* Dillon, 234 U. S., 753 (*per curiam*).

Yazoo & M. V. R. R. Co. *vs.* Wright, 235 U. S., 376, 378 (memorandum).

Baugham, Admr., *vs.* N. Y., Phila. & Norfolk R. R. Co., 241 U. S., 237, 241.

the judgment under review should be affirmed with costs.

The above cases are decisive of this case unless, as is contended in plaintiff in error's supplemental brief, the refusal of the learned trial judge, in the circumstances disclosed by the evidence, to charge the jury that since the passage of the Federal Employers' Liability Act the risk the employee assumes is that of "the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carriers' officers, agents, and employees," and the accompanying comment of said judge that

> "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the

> risk of his employment in any case where a violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee.
>
> "'I decline to charge as requested because this is not an action of the kind specified in section 4.'"

constitute palpable and reversible error (R., 167).

The supplemental argument of plaintiff in error seems to be based upon the fact that the two portions of the train in making failed to couple because of a broken lug on the coupler of the standing car (R., 56), the suggestion being that the presence of such broken lug constituted a violation of a statute enacted for the safety of employees.

The failure of plaintiff in errors' main brief to indicate any reliance upon this position is plain proof of the fact that the supplemental brief was meant to present something novel, not presented to either the trial court or the circuit court of appeals. But in any event the suggestion now made cannot carry, for it cannot successfully be contended that the existence of the broken lug, even though it constitute a violation of the Safety Appliance Act (Delk *vs.* St. Louis, &c., R. Co., 220 U. S., 580), was more than incidental and constituted a contributing or proximate cause of the injury complained of.

As was said in Seaboard Air Line Ry. Co. *vs.* Horton, 233 U. S., 492, the Federal Employers'

Liability Act does not constitute the carrier a guarantor of the safety of the place of work or of its machinery and appliances. "The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen." The car in question had been inspected just prior to the accident and the defect in the lug had not been detected (R., 131, 133). To convict defendant of negligence under the first section of the Act the plaintiff must not only prove the existence of the defect complained of, but also that its existence was the proximate cause of the injury suffered. As further said by this Court in Seaboard Air Line Ry. Co. *vs.* Horton, *ubi supra*—

> "To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the Act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the Act now limits the responsibility of the company as indicated."

At the moment of accident the employees were not engaged in the business of coupling up the cars. The two drafts had been separated by at least twenty feet, and the injury resulted not from

any attempt to couple them together, but from a wholly independent cause, that is in the dropping of a further draft from the hump as alleged at negligent speed and without proper notice or caution. It is true that at the moment Murphy was working with or upon a defective coupling, but the proximate as well as the sole cause of the accident was foreign and apart from the circumstance that the particular coupler had failed and might again fail to couple on impact and without the necessity of any man going between the cars. At the moment no effort to couple up was being made or even in contemplation.

The result, from the standpoint of the Employers' Liability Law, would have been the same, if no effort to couple had at any time been made.

To like effect is also St. Louis, I. M. & S. R. Co. *vs.* McWhirter, 229 U. S., 265:

It is plain from the uncontradicted evidence that no duty to go between the ends of the uncoupled cars rested upon decedent. Murphy, the Assistant Yardmaster, was doing all that was necessary in that regard. Boldt, the deceased, was acting as lookout. It was his duty under the rule and the well-established practice to look out for and to keep safe Murphy, who, under the circumstances and the established method of operation, was in a position of danger. Boldt was not required by Murphy or anyone else in authority to "come in between those cars" (R., 90, 94).

Abandoning the duty which he should have and

was expected to have performed, voluntarily, and without protecting himself as required by rule 180, he stepped from safety into a position of danger. Danger not remote, but immediately imminent, as he should and undoubtedly would have perceived had he looked in the direction whence danger was to have been apprehended.

The sole cause of the injury which resulted in his death was his own act, and in such case it is well settled that there can be no recovery under the Federal Employers' Liability Act.

Grand Trunk, &c., Co. *vs.* Lindsay, 233 U. S., 42.

Ellis *vs.* Louisville, &c., R. Co., 155 Kentucky, 745.

The true issue upon which plaintiff's right of recovery necessarily depends was as to the negligence of the defendant railroad company, if any, the contributory negligence of the deceased, and the causal relation of either to the accident which resulted in the death of plaintiff's intestate. Paraphrasing expressions of this court in Great Northern R. Co. *vs.* Wiles, 240 U. S., 444, the condition demanded the performance of lookout duty by Boldt—a duty not only to himself but to Murphy also. The rules of the company were devised for such condition and provided for its emergency. His fate gives pause to blame, but his neglect to properly look out might have brought death to Murphy as it did to himself. His duty was as clear

as its performance was both easy and safe. He knew the danger of the situation, that it was impending even if not imminent, and to avert it he had only to give the usual signals to the engineman on the hump or to the rider on the approaching "cut." To do something that he was not called upon to do, he turned his back to the thing that he should have done, placed himself in a position against which he was both warned and forbidden by the company's rules governing him and his employment, and so brought injury and death upon himself.

The opinions of this Court in Southern Pacific Co. *vs.* Pool, 160 U. S., 438, is both apposite and enlightening.

It is respectfully submitted the concurring judgments of the two lower courts should be permitted to stand.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
FRANK RUMSEY,
H. J. ADAMS,
For Defendant in Error.

BOLDT, ADMINISTRATRIX OF BOLDT, *v.* PENNSYLVANIA RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 62. Argued November 16, 19, 1917.—Decided January 7, 1918.

Under the Federal Employers' Liability Act, except in the cases specified in § 4, the employee assumes extraordinary risks incident to his employment, and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him.

While between cars in a freight yard, helping to repair a faulty coupler, plaintiff's intestate was killed, due to the impact of a string of cars,

moving by gravity under control of a brakeman. It was contended that the brakeman negligently permitted the moving cars to strike with too great violence and that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while about his task; and some evidence tended to support both claims. But, *held*, that plaintiff was not entitled to have the jury instructed that "the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees."

218 Fed. Rep. 367, affirmed.

THE case is stated in the opinion.

Mr. Henry W. Brush and *Mr. Rufus S. Day*, with whom *Mr. Frank Gibbons* and *Mr. C. W. Dille* were on the briefs, for plaintiff in error.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery*, *Mr. Frank Rumsey* and *Mr. H. J. Adams* were on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

At Buffalo, New York, defendant has a yard where freight trains are made up. Cars under control of a brakeman descend by gravity to desired positions on connecting tracks which lie southward of the "hump" or high point. A rule forbade employees from going between cars without first taking precautions not observed in the present case. Some evidence tended to show that under long-continued practice, considered good railroading, cars (in "strings" or "cuts") were constantly sent down and purposely allowed to strike others with sufficient force to secure coupling, but not hard enough to injure the equipment, "regardless of the position the men are in, putting them under obligation to take care of themselves."

While between cars, contrary to instructions, and assisting in an effort to adjust a faulty coupler, Edward J. Boldt, an experienced yard conductor, was killed. The coupler was at the south end of a "string" standing on an inclined switch; another "string" moving down from the north, hit the standing one violently and drove it against deceased and across a space of twenty feet.

Suing under the Federal Employers' Liability Act plaintiff maintained that the brakeman in control negligently permitted the moving cars to strike with too great violence; also that the company negligently failed to promulgate and enforce adequate rules to safeguard deceased while occupied about his task; and some evidence tended to support both claims. The Circuit Court of Appeals affirmed a judgment upon verdict for defendant after the trial court had denied motion for new trial based solely upon its refusal to give the charge specially requested by plaintiff and copied below. 218 Fed. Rep. 367.

To the general charge plaintiff made no objection whatever. In the first paragrpah it declared: "The foundation for the action is the Employers' Liability Act, which was passed by Congress in the year 1908, and which substantially provides that if the employees of interstate railway carriers are injured while at work, on account of the negligence of the employer, or on account of the negligence of an officer or agent, or, indeed, even on account of the negligence of a fellow servant, that a recovery can be had." Continuing, it explained nature of the accident, relationship, responsibilities and obligations of parties, definition and effect of contributory negligence, etc.

Concerning assumption of risk the court said: "Evidence has been given by other witnesses that customarily cars are sent over this 'leader' into the yard of the defendant, and into the railroad yards of other railroad companies, *ad libitum*,—that is, they are sent freely, one after another, to classify them and to make up trains when

already classified; they are defined as 'live tracks,'—a dangerous place to work, gentlemen, and workmen who take upon themselves occupations of that character *assume the ordinary risks of the employment;* they assume the risks that are incident to the particular avocation." "The decedent, as I have already stated, was bound to take care, and exercise diligence, and avoid any accidents from the movements of the cars in the yards and while at work. A railroad company, gentlemen, does not guarantee or insure the safety of its employees; it is merely obliged to use ordinary care to prevent unusual risks by the decedent, which, under the circumstances, and the manner in which the work was ordinarily done, could not be reasonably anticipated." "You must be satisfied, gentlemen, in order to give her an award, that it is due to her because of the negligence of the defendant railroad company, and, if you also believe that it was due to the negligence of the decedent himself, who was engaged in a risky occupation, he, as I said before, assumed the ordinary risks of his employment, then you may apportion the damages."

At defendant's request and without objection, the jury were told "that the decedent assumed the obvious necessary risks of the employment in which he was engaged."

Plaintiff then asked a charge that "the risk the employee now assumes, since the passage of the Federal Employers' Liability Act, is the ordinary dangers incident to his employment, which does not now include the assumption of risk incident to the negligence of the carrier's officers, agents or employees." Denying the request, the court said: "Under the Employers' Liability Act the employee simply assumes the risk of his employment. Section 4 reads, 'such employee shall not be held to have assumed the risk of his employment in any case where a violation by such common carrier of any statute enacted

for the safety of employees contributed to the injury, or death of such employee.' I decline to charge as requested, because this is not an action of the kind specified in Section 4." This denial is the only error properly assigned here; and the circumstances afford no reason for departing from the general rule which limits our consideration to it.

Section 1, Employers' Liability Act, 35 Stat. 65, declares that carriers "shall be liable in damages to any person suffering injury while he is employed," etc., "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." In cases within the purview of the statute the carrier is no longer shielded by the fellow-servant rule, but must answer for an employee's negligence as well as for that of an officer or agent.

In *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503, we said: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 235.

At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him. Shearman & Redfield on Negligence (6th ed.), § 208; Bailey Personal Injuries (2d ed.), § 385. This general doctrine was clearly recognized in *Gila Valley &c. Ry. Co.* v. *Hall*, 232 U. S. 94, 101; *Jacobs* v. *Southern Ry. Co., supra; Chesapeake & Ohio Ry. Co.* v. *De Atley*, 241 U. S. 310, 313, and *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 324.

The request in question did not accurately state any applicable rule of law and was properly refused. Already the jury had been told that deceased assumed the ordinary risks of his employment—a statement more favorable than plaintiff could properly demand. The risk held to have been assumed in the *Horton Case* certainly arose from negligence of some officer, agent or employee; and if the negligence of all these should be excluded in actions under the Employers' Liability Act it is difficult to see what practical application could ever be given in them to the established doctrine concerning assumption of risk.

The judgment below is

Affirmed.

MR. JUSTICE DAY took no part in the consideration or decision of this cause.